TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 649.

ALVAH CROCKER ET AL., TRUSTEES, PETITIONERS,

vs.

JOHN F. MALLEY, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 2, 1916.
CERTIORARI AND RETURN FILED NOVEMBER 20, 1916.

(26,735)

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INDEX.

R (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 30, 1919.

a United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1323.

ALVAH CROCKER et al., Trustees, Plaintiffs, Plaintiffs in Error,

v.

JOHN F. MALLEY, Collector, Defendant, Defendant in Error.

No. 1324.

JOHN F. MALLEY, Collector, Defendant, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

Error to the District Court of the United States for the District of Massachusetts.

Judgment in District Court (Bingham, J.), October 24, 1917.

RECORD.

Felix Rackemann, Dunbar & Rackemann, for Alvah Crocker et al., Trustees.

Thomas J. Boynton, United States Attorney; Lewis Goldberg, Asst. U. S. Attorney, for John F. Malley, Collector.

Boston: Printed under direction of the Clerk. 1917.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

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No. 1324.

JOHN F. MALLEY, Collector, Defendant, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

Plaintiffs' Writ of Error.

UNITED STATES OF AMERICA, *ss:*

[L. S.]

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Alvah Crocker and Charles T. Crocker, both of Fitchburg, in the District of Massachusetts, John J. Ricker, of the City of New York in the State of New York, Isaac T. Burr, of Milton, in the District of Massachusetts, and Samuel E. M. Crocker, of said Fitchburg, Trustees under Declaration of Trust dated March 29th, 1912, known as "The Wachusett Realty Trust," plaintiffs, and John F. Malley, of Boston, in our District of Massachusetts, as Collector of Internal Revenue for the Third District of Massa-
2 chusetts, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the twenty-eight day of November next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable James M. Morton, Jr., the thirtieth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES S. ALLEN,
Clerk of the District Court of the United States, District of Massachusetts.

Allowed by
GEORGE H. BINGHAM,
U. S. Circuit Judge.

Return of District Court on Writ of Error.

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court this twenty-third day of November, A. D. 1917.

[SEAL.] JAMES S. ALLEN, *Clerk.*

Defendant's Writ of Error.

UNITED STATES OF AMERICA, *ss:*

[L. S.]

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Alvah Crocker and Charles T. Crocker, both of Fitchburg, in the District of Massachusetts, John J. Ricker, of the City of New York in the State of New York, Isaac T. Burr, of Milton, in the District of Massachusetts, and Samuel E. M. Crocker, of said Fitchburg, Trustees under Declaration of Trust dated March 29th, 1912, known as "The Wachusett Realty Trust," plaintiffs, and John F. Malley, of Boston, in our District of Massachusetts, as Collector of Internal Revenue for the Third District of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf,

do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the 28th day of November next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable James M. Morton, Jr., the thirtieth
4 day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES S. ALLEN,
Clerk of the District Court of the United States, District of Massachusets.

Allowed by
GEORGE H. BINGHAM,
U. S. Circuit Judge.

Return of District Court on Writ of Error.

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court this twenty-third day of November, A. D. 1917.

[SEAL.] JAMES S. ALLEN, *Clerk.*

5 TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 823, Law Docket.

ALVAH CROCKER et al., Trustees, Plaintiffs,

v.

JOHN F. MALLEY, Collector, Defendant.

Writ.

MASSACHUSETTS DISTRICT, *ss:*

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of John F. Malley, of Boston, in our District of Massachusetts, as Collector of Internal Revenue for the Third District of Massachusetts, to the value of Sixteen Thousand Dollars, and summon the said defendant (if he may be found in your District), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March next: Then and there, in our said Court, to answer unto Alvah Crocker and Charles T. Crocker, both of Fitchburg in said District of Massachusetts, John J. Ricker of the City of New York in the State of New York, Isaac T. Burr of Milton in said District of Massachusetts, and Samuel E. M. Crocker of said Fitchburg, Trustees under Declaration of Trust dated March 29th, 1912, known as "The Wachusett Realty Trust," in an action of contract.

To the damage of the said plaintiffs (as they say) the sum of Sixteen Thousand Dollars, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the fifteenth day of January in the year of our Lord one thousand nine hundred and seventeen.

WILLIAM NELSON, *Clerk.*

6 *Officer's Return on Writ.*

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, January 29th, 1917.

Pursuant hereunto I have this day attached a chip as the property of the within-named John F. Malley, as Collector of Internal Revenue for the Third District of Massachusetts, and later in the same day

summoned him to appear at court and answer as within commanded, by delivering an original summons of this writ to him in hand at said Boston.

JOHN J. MITCHELL,
U. S. Marshal,
By CHARLES A. BANCROFT, *Deputy.*

Fees.

Service	$2.00
Travel	.06
	$2.06

This cause was duly entered at the March Term of this court, A. D. 1917, when and where the parties appeared by their respective attorneys.

At the entry of said cause, the following Declaration was filed:

Declaration.

[Filed March 20, 1917.]

And the plaintiffs say:

1. The plaintiffs are now and have been at all times since the passage of the Act of Congress commonly known as the Federal Income Tax Act, approved October 3, 1913, the trustees under a certain trust instrument, or declaration of trust, dated the twenty-ninth day of March in the year 1912, which was made and executed on or about the day of its date, a copy of which instrument is hereto annexed and hereby referred to and made a part hereof, marked "Exhibit A."

2. The plaintiffs, except the plaintiff Isaac T. Burr, are the persons who, together with Felix Rackemann, made and executed the said declaration of trust (Exhibit A). Said Rackemann subsequently in the year 1912 resigned and the vacancy in the number of trustees so occasioned was duly filled by the appointment of said Isaac T. Burr.

7 3. The plaintiffs, trustees as aforesaid, held under the said declaration of trust, in the years 1913, 1914 and 1915 and in each of said years, a large number of shares of the capital stock of Crocker, Burbank & Company, Inc., a Massachusetts corporation, of the par value of $100 each and of a market value in the aggregate in excess of $1,000,000, and as such trustees collected dividends upon said shares of stock. And the plaintiffs also owned, as part of said trust estate, real estate and mill property in the City of Fitchburg, Massachusetts, having a fair value in excess of $500,000 and from which they received a rental in excess of $50,000 per annum during the years 1913, 1914 and 1915.

4. Said declaration of trust (Exhibit A) did not create or organize or establish an association, joint stock company or corporation, and neither the trustees thereunder, nor the cestuis que trust, nor any

group or groups of persons having any right, title or interest in and to the property held thereunder and in and to its income, rents, issues and profits, under the terms, trusts and provisions of said instrument, constitute or have ever constituted an association, joint stock company, or corporate or quasi corporate organization. The said trustees are and have always been, since the inception of said trust, strict trustees, and the persons entitled to beneficial interests in the property held by the trustees thereunder, and in the income thereof, and in the terms, trusts and provisions of said instrument, are and always have been strictly trust beneficiaries, or cestui- que trust, without any relations or association among themselves or with the said trustees. The name "The Wachusett Realty Trust" is the title by which the trust created by said declaration of trust is therein designated, for purposes of convenient reference, and, as such, is not and never has been the name of a corporation, association, joint stock company or organization of any kind and the plaintiffs, as the trustees of said The Wachusett Realty Trust, are not now, and were not in either or any of the years 1913, 1914 and 1915, themselves an association, joint stock company or corporation, taxable under Section II, sub-section G, of said Federal Income Tax Act, nor were said trustees the trustees, agents, officers or representatives of any such association, joint stock company or corporation.

5. The plaintiffs, as trustees under said declaration of trust (Exhibit A), duly filed returns, on Form 1041, of the income received by them in the tax years ending December 31, 1913, December 31, 1914, and December 31, 1915, in accordance with Section II, subsection B, of said Federal Income Tax Act, which provides specifically for returns of income by, and taxation thereon, of guardians, trustees, executors and others acting in any fiduciary capacity. The return, filed as aforesaid, for the year 1913 showed no net taxable income. The return, filed as aforesaid, for the year 1914 showed taxable income, and the said trustees were assessed thereon and paid to the defendant, Collector of Internal Revenue for the Third District of Massachusetts, the tax so assessed, amounting to the sum of $1,352.03.

6. On or about the thirteenth day of May, 1916, after the plaintiffs, as trustees as aforesaid, had duly filed their return for the tax year 1915, on Form 1041, they were notified by said Collector of Internal Revenue that the Commissioner of Internal Revenue of the United States, claiming to act under and by virtue of the provisions of said Federal Income Tax Act, had ruled that the aforesaid The Wachusett Realty Trust was subject to tax under said Act as an association and must file an amended return as such upon Form 1031, Revised. And thereafterwards, the plaintiffs were notified by said Collector of Internal Revenue that similar amended returns must be filed for the tax years 1913 and 1914, as well as for the tax year 1915.

7. Thereafterwards, on or about the twenty-third day of August, 1916, and solely because of the said notifications and demands by the said Commissioner of Internal Revenue and by the said Collector of Internal Revenue, the plaintiffs filed new and amended returns, each upon Form 1031, Revised, of income received by them in the tax years 1913, 1914 and 1915, respectively, from the property held

by them under said declaration of trust (Exhibit A), said returns being made out upon the assumption that said income was the income of an association known as The Wachusett Realty Trust,
9 which, as the plaintiffs say, was not in accordance with the fact, but was in accordance with said notifications and demands of said commissioner and of said Collector, and said returns were made and filed under protest duly noted thereon.

8. Thereafterwards the said Commissioner of Internal Revenue, claiming to act under said Federal Income Tax Act, but wrongfully and unlawfully, assessed taxes upon The Wachusett Realty Trust for three years as follows:

For the year ending December 31, 1913, a tax of $45.22.

For the year ending December 31, 1914, a tax of $3,840.

For the year ending December 31, 1915, a tax of $6,990.18.

And said assessments and each of them were made on the erroneous assumption, adopted and acted upon by said commissioner, that the income of said The Wachusett Realty Trust was the income of an association liable to taxation as such under the said Federal Income Tax Act.

And on or about the ninth day of October, 1916, the said Collector of Internal Revenue sent bills to the plaintiffs for the taxes assessed as aforesaid, one separate bill for the tax so assessed in respect of each of said years 1913, 1914 and 1915, and the said Collector required and compelled the plaintiffs, as trustees under said declaration of trust (Exhibit A), to pay said taxes, amounting in the aggregate to the sum of $10,875.40, which sum the plaintiffs, as such trustees, paid on October 11, 1916, to the defendant, Collector of Internal Revenue, as aforesaid, but under written protest made and delivered to said defendant at the time of said payment that they, the said trustees, did not acknowledge the validity of either or any of the three assessments aforesaid, or of the demands made upon them for payment of same by the defendant, and that they made payment of them and of each of them under protest and that such payments were unlawfully required of them.

9. The plaintiffs thereafter in due form made claims for refund of each and all of the said three assessments and taxes paid to the defendant as aforesaid, by applications in writing to the said Commissioner of Internal Revenue, on the ground that said assessments and each of them had been illegally and improperly made
10 upon the erroneous theory that the property held by the plaintiffs under said declaration of trust (Exhibit A) was the property of an association and that the income of said trust was taxable under the provisions of said Federal Income Tax Act as the income of an association, which applications and claims for refund were afterwards rejected and denied by said Commissioner of Internal Revenue. The said commissioner on the tenth day of November, 1916, acted upon and rejected said claim for refund of the tax assessed as aforesaid for the year 1913, and on the twelfth day of January, 1917, he acted upon and rejected said claims for refund of said taxes assessed for the years 1914 and 1915.

Whereby, and by reason of said payment made by the plaintiffs

under protest to the defendant of said illegal assessments amounting in the aggregate to the sum of $10,875.40 as aforesaid, and by reason of the rejection by said Commissioner of Internal Revenue of said claims for refund of said illegal and wrongful assessments, paid as aforesaid, an action has accrued to the plaintiffs to recover the sums so paid as aforesaid, and each and every of them, with interest.

By their Attorneys,

DUNBAR & RACKEMANN.
FELIX RACKEMANN.

EXHIBIT A.

The Wachusett Realty Trust.

Declaration.

Know all Men by these Presents:

That we, Alvah Crocker and Charles T. Crocker both of Fitchburg in the Commonwealth of Massachusetts, John J. Riker of the City and State of New York, Samuel E. M. Crocker of said Fitchburg, and Felix Rackemann of Milton in said Commonwealth, the grantees named in a certain deed from the Crocker Burbank & Co., Inc. (Maine Corporation), dated this day by which deed there are conveyed to us certain lands and buildings situate in the City of Fitchburg in the Commonwealth of Massachusetts, hereby declare and agree that we will, and our heirs and successors shall, hold said granted premises, and all other funds and property at any time
11 transferred to and received by the Trustees hereunder for the purposes, with the powers, and subject to the provisions hereof, for the benefit of the cestui que trusts (who shall be trust beneficiaries only, without partnership, associate or any other relation whatever inter sese), and upon the trusts following, viz:

1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion and distribution, except that the same shall not be postponed beyond the end of twenty years from and after the death of the last survivor of the persons named and described in the last paragraph hereof. During such postponement, and until such conversion, the interests of the cestui que trusts shall be considered for purposes of transmission and otherwise as personal property.

2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having, for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have

if they were themselves the sole and absolute beneficial owners thereof in fee simple.

3. In trust to collect and receive all rents and income from the property, and semi-annually or oftener at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income, to and among the several cestui que trusts, according to their respective fractional interests, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development of the property held hereunder, or the acquisition of other property as the Trustees may determine to be wise and expedient, for
12 the protection and development of the trust property as a whole pending its conversion and distribution. The determinations of the Trustees, made in good faith, as to all questions as between "capital" and "income" shall be final.

4. The said Crocker, Burbank & Co. Inc. (Maine Company) having determined to wind up its affairs and be dissolved, without waiting for final cash sale of its real estate, this trust is declared in favor, and for the benefit of the eight shareholders of said Maine corporation, according to their respective fractional interests, to whom the Trustees shall issue proper receipt certificates, which certificates, and all others which may be hereafter issued in exchange or substitution therefor, shall be deemed parts hereof and conclusively evidence the ownership of respective interests in this trust; and the Trustees shall, from time to time, on request, (on surrender of the old) issue such new certificates as may be proper and necessary to evidence any new or sub-divided interests.

5. The trustees shall have authority to borrow money and fix the terms of any loans, and give any pledge, mortgage or other security which they may deem wise.

No purchaser from or lender to the Trustees shall ever have any liability to see to the application of any proceeds.

6. The Trustees may employ all such agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors or omissions of such agents or attorneys employed and retained with reasonable care.

7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustee serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability except for the results of his own gross negligence or bad faith.

8. The recording of this instrument shall be at such times and in such places as the Trustees may in their discretion, determine to be necessary or expedient, and they shall in like manner determine the form and record of all muniments of title.

13 9. The Trustees shall have full power at any time, pending final termination of this trust, to transfer the whole or any part of the property then held by them hereunder to any corpora-

tion which they may acquire or cause to be organized for the more convenient or expedient holding or management of the property, taking any securities issued by such corporation in exchange and payment therefor, and the Trustees, or any of them, may at any time be or become directors or officers of any corporation any shares of which are held by them.

10. The Trustee shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent reckoned upon the gross income received by them as such, unless, at any time, a majority in interest of the cestui que trusts consent in writing to some larger compensation for any past service. The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses to and from any meetings of the Trustees shall be considered proper expenses.

11. Any Trustee hereunder may resign by written instrument duly acknowledged and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

Any vacancy in the office of the Trustee, however occasioned, shall be filled by the remaining Trustees by an instrument in Writing, signed by them and assented to in writing, by the holder or holders of a majority in amount of the beneficial interests herein, such appointment to be in like manner attached to the original of this instrument, or recorded as in the case of resignation last above provided for.

12. If, at any time or times, a majority of the Trustees hereunder shall certify in writing that the remaining Trustees are either absent from the Commonwealth of Massachusetts or incapacitated through illness or otherwise, from action, then such majority shall, at such time or times, have, and may exercise, any and all powers of the Trustees hereunder with like effect as if similarly exercised by all.

14 13. The terms and provisions of this trust may be modified at any time or times by instrument in writing, signed, sealed and acknowledged by the then Trustees, assented to in writing by a majority in interest of the cestui que trusts, and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

14. The certificate in writing of the Trustees as to any resignation from the office of Trustee hereunder and as to the appointment of any new trustees hereunder and as to the existence or non-existence of any modifications hereof, may always be relied upon, and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees in reliance upon such certificate.

15. The title of this trust (fixed for convenience), shall be "The Wachusett Realty Trust," and the term "Trustees" in this instrument shall be deemed to include the original and all successor trustees.

16. At the end of twenty years from and after the death of the

last survivor of said Charles T. Crocker, Samuel E. M. Crocker and Alvah Crocker, and of the lawful issue now living of any of them (unless this trust shall theretofore have been otherwise lawfully terminated), all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled.

In Witness Whereof we have hereunto set our hands and common seal on this 29th day of March, in the year nineteen hundred and twelve.

ALVAH CROCKER.
CHARLES T. CROCKER.
JOHN J. RIKER.
SAMUEL E. M. CROCKER.
FELIX RACKEMANN.

COMMONWEALTH OF MASSACHUETTS.
Worcester, ss:

March —, 1912.

Then personally appeared the above named Alvah Crocker and acknowledged the foregoing instrument to be his free act and deed. Before me,

—— ——.

15 At the same term the following Answer was filed:

Answer.

[Filed March 23, 1917.]

Now comes the defendant in the above-entitled action, and for answer denies each and every material allegation, item and particular in the writ and declaration contained.

GEORGE W. ANDERSON,
United States Attorney,
By JAMES S. ALLEN, JR.,
Assistant U. S. Attorney.

At the same term the following Waiver of Jury Trial was filed:

Waiver of Jury Trial.

[Filed June 15, 1917.]

The parties to the above-entitled action hereby waive trial by jury.

DUNBAR & RACKEMANN,
For the Plaintiff.
JAMES S. ALLEN, JR.,
For the Defendant.

Also on said fifteenth day of June, A. D. 1917, the following Agreed Statement of Facts was filed:

Agreed Statement of Facts.

[Filed June 15, 1917.]

It is hereby agreed by counsel in the above-entitled cause that the following facts, at least for the purposes of this case, may be considered true with like effect as if duly and properly established by the plaintiffs by evidence adduced at the trial or by agreement of counsel in open court.

For many years prior to the year 1912, Crocker, Burbank & Company, Inc., was a corporation organized under the laws of the State of Maine, but with a principal and only place of business, and with assets real and personal, situated in the City of Fitchburg, County of Worcester, Commonwealth of Massachusetts, and no other plant or property.

16 That in the year 1912 a new corporation was organized under the laws of Massachusetts and known as Crocker, Burbank & Company, Inc., with a capitalization of $2,400,000.

The Maine corporation had been the incorporation of a former partnership known as Crocker, Burbank & Co., which, for many previous years, had done business in said Fitchburg as paper manufacturers, and the stockholders of said Maine corporation were a few of the members of the families of the fomer partners of said firm.

Alvah Crocker, descendant of one of the former partners, was the president of the Maine corporation and became president of the Massachusetts corporation. The original partnership and the Maine corporation had built up a considerable business as paper manufacturers, with a number of mills along the banks of the Nashua River, on the west side of the City of Fitchburg, and in order to control the possible pollution of said stream had acquired numerous and considerable outlying tracts of land in no wise otherwise pertaining to their business.

When the new company was formed under the laws of Massachusetts it was desired to keep the capitalization of the company low, and it was not desired that the new Massachusetts company should then acquire the ownership of all of the real estate at the time owned by the Maine corporation, but should only acquire certain of the mill properties and the waterpowers. This was accordingly arranged and done. One of the mill properties was then in process of construction and not completed. The Massachusetts company took over the remaining seven mill properties in fee, and pending the development of further plans took at the same time from the Maine corporation a lease of its remaining real estate, including the eighth mill property in process of construction, the outlying parcels of real estate and some tenements then occupied by some of its employees, issuing in consideration for such transfer all its capital stock to the Maine corporation.

It was desired to dissolve the Maine corporation, and therefore it was necessary for that corporation to completely dispose of its assets.

On the suggestion of Mr. Alvah Crocker, president of the company, to the shareholders, so much of the real estate of the Maine
17 corporation as was not purchased and acquired by the Massachusetts corporations was left in the hands of himself and four associates, as trustees, for the purpose of liquidation, and pending this liquidation the shares of the Massachusetts corporation, taken by the Maine corporation in payment for the property conveyed to the Massachusetts corporation, were also left in the hands of the same trustees. This arrangement was assented to by each individual shareholder of the Maine corporation, merely by the surrender of the old Maine company shares and the acceptance of the new trust receipts in place thereof. The Maine corporation thereupon conveyed the seven mill properties to the Massachusetts corporation, took the shares of capital stock of the Massachusetts corporation in payment, turned these shares over to the trustees and conveyed the remaining real estate (subject to the lease made by the Maine corporation to the Massachusetts corporation) to Alvah Crocker and others, trustees, who thereupon made and declared the trusts upon which they received and were to hold the said remaining real estate. A copy of said declaration of trust is attached hereto and referred to.

To each of the eight former shareholders of the Maine corporation the trustees under said declaration of trust issued a receipt certificate (the form of which is attached hereto) evidencing his fractional beneficial interest in the trust property, the fractional proportion of each beneficiary being the same as the proportion of the capital stock of the Maine corporation which he had formerly held.

The conveyances above mentioned were made and the declaration of trust was signed and completed on or about the twenty-ninth day of March, 1912.

The Maine corporation was then dissolved by court decree under the Maine statute.

Since that time the trustees have remained the same, except that Felix Rackemann, who served temporarily in the absence of Mr. I. T. Burr, resigned, and said Burr was duly appointed by the remaining trustees in his place.

The trustees under said declaration have since continued to
18 hold the shares of the capital stock of the Massachusetts corporation except a few shares thereof in the name of each director, and have continued to hold title to the real estate as conveyed to them by the Maine corporation, subject to the lease to the Massachusetts corporation as aforesaid. They have received from time to time rental from the Massachusetts corporation and the dividends as declared upon the capital stock of the Massachusetts corporation, and have disbursed such income, less charges and disbursements for taxes and similar expenses, to their several beneficiaries in proportion to their respective interests.

The beneficiaries under said trust declaration have never taken any action whatever in respect of said declaration or in respect of the property held by the trustees thereunder, except that a majority in interest of said beneficiaries did assent to the appointment, as made by the remaining trustees, of said Burr as successor trustee to said Rackemann.

There has never been any meeting of the beneficiaries under said trust declaration, nor any call for or attempt at such meeting. There has never been any modification or attempted modification of the trust instrument. There has never been any direction or control in any manner of the trustees, by the beneficiaries or any of them, given, exercised, or attempted to be given or exercised.

The trustees under said declaration have always held and managed the trust property strictly in accordance with said declaration of trust and said declaration of trust evidences the entire understanding and relation between the trustees and the beneficiaries respecting the trust property. There is no other agreement or obligation of any kind in any way affecting or qualifying the said declaration.

The present trust beneficiaries are fourteen members of the Crocker family, two connections by marriage of said family, and one unrelated friend of the family, and no more.

The allegations of fact set forth in paragraphs one, two, three, five, six, eight and nine of the plaintiff's declaration, also of paragraph seven, except the words "was not in accordance with the fact but", are for the purposes of this case admitted to be true, and copies
19 of the plaintiff's several returns and claims for refund are hereto attached and may be referred to.

Either party shall be at liberty to prove or give evidence of any further facts which may be competent, relevant and material.

DUNBAR & RACKEMANN,
Attorneys for Plaintiff.
JAMES S. ALLEN, Jr.,
Special Assistant U. S. Attorney.

The Wachusett Realty Trust.

No. —. (24,000.)

This is to certify that —— —— of —— is entitled to — twenty-four thousandths of the net proceeds of the property held under Declaration of Trust made by Alvah Crocker et ali, dated March 29, 1912, known as "The Wachusett Realty Trust," when said property is converted into cash (and meantime to income), all as therein provided. Said Declaration is recorded with Worcester County, Mass. (No. Dist.) Deeds, and all the terms thereof are, by reference, made part hereof and expressly assented to.

The holder hereof has no interest, legal or equitable, in any specific property and the interest hereby represented can be transferred only by due endorsement and surrender hereof and transfer noted on the books kept for the purpose by the Trustees, or their agent.

ALVAH CROCKER,
CHARLES T. CROCKER,
JOHN J. RIKER,
SAMUEL E. M. CROCKER,
FELIX RACKEMANN,
Trustees.
OLD COLONY TRUST COMPANY, *Agent.*
By —— ——.

Dated —— —, 19—.

20 Value Received. The undersigned hereby sells, assigns and transfers unto —— —— of the fractional interest represented by the within certificate, and — does hereby constitute and appoint —— —— true and lawful attorney irrevocable in the name and stead of the undersigned to make transfer accordingly on any books or records of the trustees.

—— ——.

Witness—

—— ——.

Dated —— —, ——.

Summary of Returns of Net Income for 1913, 1914, *and* 1915 *of the Wachusett Realty Trust of Fitchburg, Mass., Claims for Refund, Letter Rejecting Same, etc.*

Supplementary Income Tax.

(Form 1031.)

Return of Annual Net Income. Corporations.

Return under protest of net income for the Calendar year ended December 31, 1913, made on the assumption required by the U. S. Internal Revenue Commissioner that this Trust is an association by the Trustees of the Wachusett Realty Trust, so called holding property and collecting rents and dividends thereof for the benefit of cestuis que trust and located at Fitchburg, Massachusetts.

1. Total amount of the capital employed in the business of December 31, 1913	$3,118,217 78
3. Gross Income:	
(*b*) From rentals	196,000 00
(*c*) From interest	77 66
(*d*) From dividends received	408,000 00
Total gross income	$604,077 66
Total deductions	61,387 58
8. Net income	542,690 08
9. Tax assessable on 5/6th Net Income	4,522 42
Total	$4,522 42

21 Deductions.

4. (*a*) Expenses, general	$1,050 08
5. (*b*) Depreciation	60,337 50
Total deductions	$61,387 58

These same Trustees made due return of net income from the same property here reported for the year 1913 as fiduciaries and were duly assessed a tax accordingly which they paid in regular course. The Department is believed to have some plan for crediting the amount of the payment so made by these Trustees as fiduciaries on any assessment of tax made on this return, as to which reference may be had to the letter of David A. Gates, Acting Commissioner, to Felix Rackemann, dated July 28, 1916.

We, a majority of the Trustees of the Wachusett Realty Trust so called there being no other officers whose return of net income is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; this return and oath being made and given only because required, under penalty, by the U. S. Commissioner of Internal Revenue, and is so made and given under protest that it is unlawfully so required.

ALVAH CROCKER,
CHARLES T. CROCKER,
SAMUEL E. M. CROCKER,
Trustees.

Sworn to and subscribed before me this 25th day of August, 1916.
[SEAL.] CHARLES A. MORGAN,
Notary Public.

22 Orig. Filed 3/1/1915.

Supplemental Income Tax.

(Form 1031.)

Return of Annual Net Income. Corporations.

Return under protest of net income for the calendar year ended December 31, 1914, made on the assumption required by the U. S. Internal Revenue Commissioner that this Trust is an association by the Trustees of the Wachusett Realty Trust, so called holding property and collecting rents and dividends thereof for the benefit of cestuis que trust and located at Fitchburg, Massachusetts.

1. Total amount of the capital employed in the business as of December 31 1914	$3,109,584 47
3. Gross Income:	
(*b*) From rentals	196,000 00
(*c*) From interest	98 03
(*d*) From dividends received	384,000 00
Total gross income	580,098 03
Total deductions	60,894 67
8. Net income	519,203 36
Original*	135,203 36*
Additional*	384,000 00*

Deductions.

4. (*a*) Expenses, general	$239 67
5. (*b*) Depreciation	60,655 00
Total deduction	60,894 67

These same Trustees made due return of net income from the same property here reported for the year 1914 as fiduciaries and were duly assessed a tax accordingly which they paid in regular course. The Department is believed to have some plan for crediting the amount of the payment so made by these Trustees as fiduciaries on any assessment of tax made on this return, as to which
23 reference may be had to the letter of David A. Gates, Acting Commissioner, to Felix Rackemann, dated July 28, 1916.

[Signed and sworn to like preceding return.]

Original Filed Feb. 23, 1916.

Amended Return Income Tax.

(Form 1031.)

Return of Annual Net Income. Corporations.

Return under protest of net income for the Calendar year ended December 31, 1915. Made on the assumption required by the U. S. Internal Revenue Commissioner that this Trust is an Association by the Trustees of the Wachusett Realty Trust so-called, holding property and collecting rents and dividends thereof for the benefit of cestui que trust and located at Fitchburg, Massachusetts.

*Red ink amendments made by Commissioner.

1. Total amount of the capital employed in the business as of December 31, 1915		$3,232,857 75
3. Gross Income:		
(*b*) From rentals		196,000 00
(*c*) From interest		31 23
(*d*) From dividends received		566,885 00
Total gross income		762,916 23
Total deductions		63,897 78
8. Net income		$699,018 45
Deductions.		
4. (*a*) Expenses, general		$653 25
5. (*b*) Depreciation		61,892 50
7. (*a*) Taxes, domestic paid		1,352 03
Total deductions		$63,897 78

[Signed and sworn to like preceding returns.]

24 *Claim under Series 7, No. 14, Revised, and Series 7, No. 27, Supplement No. 1, for Taxes Improperly Paid, or Refundable under Remedial Statutes and for Amounts Paid for Stamps Used in Error or Excess.*

U. S. Internal Revenue.

(Form 46.)

STATE OF MASSACHUSETTS,
County of Worcester, ss:

Alvah Crocker of the City of Fitchburg and State and County aforesaid, being duly sworn according to law, deposes and says, that he and associates Charles T. Crocker, John J. Riker, I. Tucker Burr and Samuel E. M. Crocker were trustees of "Wachusett Realty Trust" so called that they were engaged in no business as such Trustees save the care of the trust property; that upon the 4th day of October, A. D. 1916, they were assessed an internal-revenue tax of thirty eight hundred and forty ($3840) dollars, claimed to be upon "Corporate Income" for the period ending 1914 which amount they afterwards on the 13th day of October, A. D. 1916, paid under protest to John F. Malley, Esq., Collector of Internal Revenue for 3rd District of Massachusetts, and which amount, as this deponent verily believes, should be refunded for the following reasons viz:

the said tax was assessed upon said Trustees upon the theory that the said "Wachusett Realty Trust" was an "association" taxable as such under the provision of Act of Congress of October 3, 1913, Section

II G.; when, in fact and in law it was not such and the Trustees were strict fiduciaries and had made due return as such fiduciaries in the year 1915 for said year 1914, showing taxable income amounting to $135,203 on which in due course they were assessed and paid a tax of $1352.03; wherefore the said assessment here complained of was wholly unlawful and void.

And this deponent now claims that, by reason of the payment of the said sum of thirty eight hundred and forty ($3840) dollars, he and his cotrustees are justly entitled to have the sum of thirty eight hundred and forty ($3840) dollars and interest refunded, and they now ask and demand the same.

And this deponent further makes oath that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented for the refunding of the above amount, or any part thereof.

ALVAH CROCKER.

Sworn to and subscribed before me this 17th day of October, A. D. 1916.

[SEAL.] CHAS. A. MORGAN.

Claim under Series 7, No. 14, Revised, and Series 7, No. 27, Supplement No. 1, for Taxes Improperly Paid, or Refundable under Remedial Statutes and for Amounts Paid for Stamps Used in Error or Excess.

U. S. Internal Revenue.

(Form 46.)

STATE OF MASSACHUSETTS,
County of Worcester, ss:

Alvah Crocker of the City of Fitchburg and State and County aforesaid, being duly sworn according to law, deposes and says, that he and associates Charles T. Crocker, John J. Ricker, I. Tucker Burr and Samuel E. M. Crocker were Trustees of "Wachusett Realty Trust" so called that they were engaged in no business as such trustees save the care of the trust property; that upon the 4th day of October, A. D. 1916, they were assessed an internal revenue tax of forty five and 22/100 dollars, claimed to be upon "Income Supplemental" for the Tax year ending Dec. 31, 1913, which amount they afterwards, on the 13th day of October, A. D. 1916, paid under protest to John F. Malley, Esq., Collector of Internal Revenue for the 3rd District of Massachusetts, and which amount, as this deponent verily believes, should be refunded for the following reasons, viz:

The said tax was assessed upon said Trustees upon the theory that the said "Wachusett Realty Trust" was an "Association" taxable as such under the provisions of Act of Congress of October 3, 1913 Section II. G., when in fact and in law it was not such and the Trustees

were strict fiduciaries and had made due return as such fidu-
26 ciaries in the year 1914 for said year 1913 showing no tax-
able income, wherefore the said assessment was wholly unlawful and void.

And this deponent now claims that, by reason of the payment of the said sum of forty five and 22/000 dollars, he and his co-trustees are justly entitled to have the sum of forty five and 22/100 dollars and interest refunded, and they now ask and demand the same.

And this deponent further makes oath that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented for the refunding of the above amount, or any part thereof.

ALVAH CROCKER.

Sworn to and subscribed before me this 17th day of October, A. D. 1916.

[SEAL.] CHAS. A. MORGAN,
Notary Public.

Claim under Series 7, No. 14, Revised, and Series 7, No. 27, Supplement No. 1, for Taxes Improperly Paid, or Refundable under Remedial Statutes and for Amounts Paid for Stamps Used in Error or Excess.

U. S. Internal Revenue.

(Form 46.)

STATE OF MASSACHUSETTS,
County of Worcester, ss:

Alvah Crocker of the City of Fitchburg and State and County aforesaid, being duly sworn according to law, deposes and says, that he and associates Charles T. Crocker John J. Riker, I. Tucker Burr and Samuel E. M. Crocker were Trustees of "Wachusett Realty Trust" so-called that they were engaged in no business as such trustees, save the care of the trust property, that upon the 4th day of October, A. D. 1916, they were assessed an internal-revenue tax of sixty-nine hundred ninety and 18/100 dollars, claimed to be upon "corporate Income" for the period ending 1915, which amount they afterwards on the 13th day of October, A. D. paid under protest to John F. Malley, Esq., Collector of Internal Revenue for
27 the 3rd District of Massachusetts, and which amount, as this deponent verily believes, should be refunded for the following reasons, viz:

The said tax was assessed upon said Trustees upon the theory that the said "Wachusett Realty Trust" was an "Association" taxable as such under the provisions of Act of Congress of October 3, 1913, Section II, G.; when, in fact and in law it was not such and the Trustees were strict fiduciaries in and had made due return as such fiduciaries in 1916 for the year 1915; wherefore the said assessment here complained of was wholly unlawful and void.

And this deponent now claims that, by reason of the payment of the said sum of sixty-nine hundred, ninety and 18/100 dollars, he and his cotrustees are justly entitled to have the sum of sixty-nine hundred, ninety and 18/100 ($6990.18) dollars refunded, and they now ask and demand the same.

And this deponent further makes oath that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented for the refunding of the above amount, or any part thereof.

ALVAH CROCKER.

Sworn to and subscribed before me this 17th day of October, A. D. 1916.

[SEAL.] CHAS. A. MORGAN,
Notary Public.

Copy.

Cl. R. Rejection.

November 10, 1916.

John F. Malley, Esq., Collector 3d District, Boston, Mass.

SIR: The claim of the Wachusett Realty Trust, of Fitchburg, Mass., for refund of $45.22, corporation income tax for 1913, has been examined and is hereby rejected, claimant's contention that it is a fiduciary and not an association not being accepted by this office.

Please notify claimant of the action taken.

Respectfully,

W. H. OSBURN, *Commissioner.*

Mac.

28 [NOTE.—By letter dated January 8, 1917, the Commissioner rejected the claims of refund for the years 1914 and 1915.]

Summary of Return of Annual Income by Fiduciaries, 1913.

Return of Income Received or Accrued During the Year Ended December 31, 1913.

(Form 1041.)

(For the Year 1913, from March 1, to December 31.)

Filed by Alvah Crocker, Acting in the Capacity of Trustee, for the Beneficiaries of the Estate or Trust of Wachusett Realty Trust.

1. Gross Income (see page 2, line 11)	$499,410.99
2. Total Deductions (see page 3, line 9)	550,490.15

This return is made under the protest that it is unlawfully required.

Gross Income.

Description of income.	A. Amount of income on which tax has been deducted and withheld at the source.	B. Amount of income on which tax has not been deducted and withheld at the source.
3. Total amount derived from rents and from interest on notes, mortgages and securities (other than reported on lines 5 and 6)	32,666,67	130,666,66
7. Total amount of income derived from any source whatever not specified or entered elsewhere on this page	None	77,66
Totals	$32,666,67	130,744,32
Aggregate totals of columns A and B		163,410,99
Total amount of income derived from dividends on the stock or from the net earings of corporations, joint stock companies, associations or insurance companies subject to like tax		336,000,00
Aggregate total of "Gross Income" (to be entered on line 1 of first page)		499,410,99

29 Deductions.

1. The amount of necessary expenses actually paid in carrying on business, but not including business expenses of partnerships, and not including personal, living or family expenses.....	$875.07
6. Amount representing a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business, not to exceed, in the case of mines, 5 per cent of the gross value at the mine of the output for the year for which the computation is made, but no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof, for which an allowance is or has been made	50,281.75
7. Total amount of income derived from dividends on the stock or from the net earnings of corporations, joint stock companies, associations, or insurance companies subject to like tax (same as entry on line 10, page 2).....	336,000.00
8. Amount of income on which the normal tax of 1 per cent has been deducted and withheld at the source (see page 2, line 8, column A) $32,666.67 and rentals reed. prior to November 1, 1913,—$130,666.66	163,333.33
9. Total Deductions (to be entered on line 2 of first page)	550,490.15

Affidavit to be Executed Where Fiduciary is an Individual.

I solemnly swear (or affirm) that I am one of the Trustees for the beneficiaries of the estate or trust of The Wachusett Realty Trust so called; that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all gains, profits and income coming into my custody or control and management during the year for which the return is made; that said bene-
30 ficiaries are entitled, under the Federal Income-tax Law of October 3, 1913, to all the deductions entered or claimed therein; that all certificates claiming personal exemption, presented by the beneficiaries, are herewith inclosed; and there is contained therein a true and complete list of the names and addresses of all beneficiaries to whom any part of the amount stated on line 3 of the first page thereof has been paid or is payable.

ALVAH CROCKER,
Trustee, Fitchburg, Mass.

Sworn to and subscribed before me this 28th day of March, 1914.
[SEAL.]
CHAS. L. MORGAN,
Notary Public.

Memo.

It might be inferred from the name "Wachusett Realty Trust" that this trust was an "association" and hence that the return should be on form 1035 [1031].

Hon. Clarence Hale, U. S. District Judge, has however found that it is, in fact, a strict trust and in no sense an association, and has so (in conference) advised Mr. Malley, Collector, and Mr. Malley has so reported to the Commissioner of Internal Revenue at Washington.

This return is made on Form 1041, in accordance with Judge Hale's decision.

ALVAH CROCKER, *Trustee*,
Per F. RACKEMANN.

Return of Annual Net Income by Fiduciaries.

Income Received or Accrued During the Year Ended December 31, 1914.

(Form 1041.)

Filed by Alvah Crocker, of Fitchburg, Massachusetts, Acting in Capacity of Trustee for the Beneficiaries of the Estate or Trust of Wachusett Realty Trust.

Answer must be given to the following question:

Are any of the beneficiaries minors, incompetents, persons under any legal incapacity, or nonresident aliens? No.

31	1. Gross Income (brought from line 15)	$196,098.03	
	2. General Deductions (brought from line 23)	60,894.67	
3. Net Income			135,203.36
5. Amount of income accrued to beneficiaries of the estate or trust as listed in column 3 below, whether distributed or not, and upon which the fiduciary is liable for the normal tax when the amount is in excess of $3,000.....			135,203.36

Gross Income.

This statement must show in the proper spaces the entire amount of gains, profits, and income received or accrued from all sources whatever coming into the custody or control and management of the fiduciary for the benefit of the beneficiaries of the trust or estate during the year specified on page 1, excepting dividends on stock of domestic corporations which are listed on page 3, and excepting income derived from the obligations of the United States or any of its possessions or of any State or political subdivision thereof, including district drainage bonds.

Description of income.	A. Income on which the tax has been paid or is to be paid at the source.	B. Income on which the tax has not been paid or is not to be paid at the source.
7. Rents	None.	$196,000.00
8. Interest on notes, mortgages, bank deposits, and securities other than reported on lines 9 and 11	None.	98.03
14. Totals (enter total of column A)	None.	196,098.03
15. Gross Income (total of columns A and B to be entered on line 1)		196,098.03

General Deductions.

16. The amount of necessary expenses actually paid within the calendar year for which this return is made in the administration of the estate or trust. There must not be included under this head personal, living, or family expenses, business expenses of partnerships, or cost of merchandise. Amounts paid for permanent improvement or betterment of property are not proper expense deductions	$239.67
21. Amount representing a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in business. No deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return	60,655.00
23. Total General Deductions (to be entered on line 2)	$60,894.67

32

Name of beneficiaries.	A. Beneficiaries' interest line 5, etc.	B. Beneficiaries' interest line 4, etc.	C. Beneficiaries' interest in dividends of dom. corp., etc.	D. Beneficiaries' interest in total net income, etc.
Barr, I. Tucker.....	$5,633.47		$16,000.00	$21,633.47
Crocker, Alvah	42,758.08		121,440.00	164,198.08
Bartow	3,943.43		11,200.00	15,143.43
Charles T.	31,547.46		89,600.00	121,147.46
Douglas	2,873.07		8,160.00	11,033.07
Helen T.	3,380.08		9,600.00	12,980.08
Randall F. ...	3,380.08		9,600.00	12,980.08
Paul	3,380.08		9,600.00	12,980.08
Samuel E. M...	8,450.21		24,000.00	32,450.21
William T. ...	3,380.08		9,600.00	12,980.08
Haskell, J. Amory.....	5,633.47		16,000.00	21,633.47
Riker, Charles L.	2,816.74		8,000.00	10,816.74
John J.	8,450.21		24,000.00	32,450.21
Samuel, Jr.	2,816.74		8,000.00	10,816.74
Sanger, Edith B.....	3,380.08		9,600.00	12,980.08
Smith, Emma Louise....	3,380.08		9,600.00	12,980.08
	$135,203.36	None	$384,000.00	$519,203.36

Affidavit to be Executed Where Fiduciary is an Individual.

I swear (or affirm) that I am one of the Trustees for the beneficiaries of the estate or trust of Wachusett Realty Trust, so called; that the foregoing return, to the best of my knowledge and belief, contains a true and complete statement of all taxable gains, profits, and income received by or accrued to me or coming into my
33 custody or control and management as such, during the year for which this return is made; that said beneficiaries are entitled, under the Federal Income Tax Law of October 3, 1913, to all the deductions entered or claimed therein; that all certificates claiming personal exemption, presented by the beneficiaries are herewith inclosed; and that there is contained therein a true and complete list of the names and addresses of all the beneficiaries to whom any part of this income accrued and a true and complete statement of the interest of each beneficiary in the income of the estate or trust, whether said income is distributed or not.

WACHUSETT REALTY TRUST,
ALVAH CROCKER, *Trustee.*

Sworn to and subscribed before me this 25th day of February, 1915.

[SEAL.]

CHAS. A. MORGAN,
Notary Public.

Form 1041 (Revised).

Return of Annual Net Income by Fiduciaries.

Income Received During the Year Ended December 31, 1915.

Filed by Alvah Crocker of Fitchburg, Massachusetts, Acting in Capacity of Trustee for the Beneficiaries of the Estate or Trust of Wachusett Realty Trust.

Are any of the beneficiaries minors, incompetents, persons under any legal incapacity, or nonresident aliens? No.

1. Gross Income	$196,031.23
2. General Deductions	63,897.78
3. Net Income	132,133.45
4. Income on which normal tax has been, or is to be paid at original source	None.
5. Amount of income of the estate or trust (other than dividends and income on which tax has been withheld at source) and which was paid to beneficiaries of the estate or trust as listed in columns 1 and 3 below	132,133.45

34 *List of Rents Received and Dividends Paid Beneficiaries in 1913.*

Filed as an Exhibit by Wachusett Realty Trust.

Rentals received.	1913.	Dividends paid.
	Feb. 14	72,000.00
48,000 rentals	Mch. 31	48,000.00
48,000 rentals	June 30	168,000.00
48,000 rentals	Sept 30	48,000.00
	Nov. 25	216,000.00
48,000 rentals	Dec. 31	48,000.00
		$600,000.00

Thereupon, on the said fifteenth day of June, A. D. 1917, this cause came on to be heard on the foregoing agreed statement of facts and was fully heard by the court, the Honorable George H. Bingham, Circuit Judge, duly assigned to hold said District Court, sitting.

This cause was thence continued under advisement to the June Term, A. D. 1917, when, to wit, July 6, 1917, an opinion and finding of the court was entered.

On the sixteenth day of October, A. D. 1917, the following Agreement for Judgment was filed:

Agreement for Judgment.

[Filed October 16, 1917.]

It is hereby mutually agreed that judgment may be entered forthwith upon the finding in the above-entitled action.

DUNBAR & RACKMANN,
Attorneys for Plaintiff.
GEORGE W. ANDERSON,
United States Attorney,
By JAMES A. HATTON,
Assistant U. S. Atty.

October 24, 1917.

BINGHAM, *J.:*

Judgment upon the finding of court for the plaintiff in the sum of $9,554.07 damages, $114.81 interest from October 11, 1916, and $— costs, pursuant to agreement.

Attest:
JOHN E. GILMAN, JR.,
Deputy Clerk.

35 Thereupon, to wit, October 24, 1917, it is ordered by the court, the Honorable George H. Bingham, Circuit Judge as aforesaid, sitting; that judgment be entered upon the finding of the court for the plaintiffs in the sum of nine thousand five hundred and fifty-four dollars and seven cents ($9,554.07) damages, together with the sum of one hundred fourteen dollars and eighty-one cents ($114.81) interest from October 11, 1916, and their costs of suit taxed at $—.

Defendant's Bill of Exceptions.

[Filed August 11, 1917; Allowed September 21, 1917.]

This action was brought by Alvah Crocker et al., trustees of the Wachusett Realty Trust, against the defendant, Collector of Internal Revenue, Third District of Massachusetts, to recover the sum of $10,875.40, taxes assessed upon the plaintiffs under the Federal Income Tax Statute of October 3, 1913, for the years 1913, 1914 and 1915 and paid by the plaintiffs under protest on October 11, 1916, and interest thereon. The plaintiffs are trustees under an agreement and declaration of trust dated March 29, 1912, a copy of which is annexed to the declaration.

Trial by jury was waived and the case came up for hearing before Bingham, J., in the District Court upon plaintiff's declaration,

defendant's answer, an agreed statement of facts and certain documentary evidence, namely, certified copies of plaintiff's returns of income for the years 1913, 1914 and 1915, certified copies of plaintiffs' claims for refund and the letters rejecting same and a statement of the rentals received and distributions made by the Wachusett Realty Trust during the year 1913, all of which documents are incorporated herein by reference.

The plaintiffs filed certain requests for findings, among which were the following:

2. The plaintiffs request the court to find that during the years 1913, 1914 and 1915 the plaintiffs were trustees under the trust instrument (Exhibit A attached to the declaration) and as such were strict fiduciaries without association either among themselves or with any or all of their trust beneficiaries within the meaning of Section II, sub-section G, of the Act of Congress of October 3, 1913.

3. The plaintiffs request the court to find that during each of the years 1913, 1914 and 1915 there was no "association" within the meaning of the Act of Congress October 3, 1913, Section II, subsection G, among any or all of the beneficiaries under the trust instrument (Exhibit A attached to the declaration) other than the trustees.

The plaintiff also requested the court to make certain rulings, among which were the following:

1. The declaration of trust (Exhibit A attached to the declaration) by its terms and apart from any other considerations, established a strict trust, under which the trustees are properly taxable under the Federal Income Tax Act of October 3, 1913, as fiduciaries, and not otherwise; and there is no evidence in the case to change that result.

2. On all the evidence in the case there were no acts or deeds by or among the trustees under the declaration of trust (Exhibit A attached to the declaration), or any of the persons beneficially interested therein, which resulted in changing the character of the trust established by the declaration, and making it other than a strict trust.

3. The provisions of the trust instrument (Exhibit A attached to the declaration), either of Article 10, providing that the trustees shall not receive compensation in excess of one per cent, unless consented to in writing by a majority in interest of the cestui que trusts; or of Article 11, providing that any vacancy shall be filled by the remaining trustees with the consent of a majority in interest of the trust beneficiaries; or of Article 13, providing that the terms of the trust may be modified by the then trustees, with the assent of a majority in interest of the cestui que trusts, nor of all of these provisions together, are not sufficient, as matter of law, to make the Wachusett Realty Trust, so called, anything other than a strict trust, or to make the trust beneficiaries associates, either inter sese or with the trustees themselves within the meaning of Section II, sub-section G, of the Act of Congress of October 3, 1913.

37 4. On all the evidence the plaintiffs were liable under the Act of Congress of October 3, 1913, to make returns and to taxation as fiduciaries, and not otherwise, in respect of the taxable years 1913, 1914 and 1915, and each of those years.

5. Unless there was some "association" among some or all of the beneficiaries under the trust instrument (Exhibit A attached to the declaration) other than the trustees, as such, the plaintiffs are entitled to recover in this action.

6. The Act of Congress of October 3, 1913, distinguishes between trusts, partnerships, strictly so called, and quasi partnerships. The latter are "associations" within the meaning of the Act. The Wachusett Realty Trust is not, and was not in the years 1913, 1914 and 1915, a quasi partnership, and was not an "association" within the meaning of the act.

The court granted all said plaintiff's requests for findings and rulings, and the defendant duly filed his exception thereto.

The defendant requested the court to make the following findings and rulings:—

1. The Wachusett Realty Trust, which is represented by the plaintiffs in this action, was during the years 1913 to 1915, inclusive, a joint-stock company or association within the meaning of Section 2-*g* (*a*) of the Act of October 3, 1913, and was taxable as such.

2. If the plaintiffs are held taxable as trustees, still they cannot deduct the sum of $130,666.66, the amount of rentals received by them before November 1, 1913, in determining their taxable net income.

The court denied both said requests, and the defendant duly filed his exception thereto.

The court filed an opinion, a copy of which is hereto incorporated by reference, which was in part as follows:—

"In deference to these decisions (Williams v. Milton, 215 Mass. 1, and Crocker v. Crocker, Hale, J., May 23, 1914), and the authorities upon which they were based, I feel constrained to hold that the plaintiffs are a trust and not an association and are subject to
38 the tax provisions of Section II, Subdivision D of the Act of October 3, 1913."

The defendant duly excepted to said ruling and finding.

The court in said opinion further ruled as follows:—

"Some objection is raised to their recovering the sum of $45.22 paid for the year 1913, on the ground that, in returning the tax, certain deductions were made from the net income which should not have been. As to this objection it may be said that the law expressly relieved the plaintiffs from retaining the tax on the $130,666.66 of rentals received and paid over to the beneficiaries before November 1, 1913, and left it incumbent upon the Government to recover the tax on such sum from the beneficiaries themselves, which it probably has done. * * * I am therefore of the opinion that the plaintiffs are entitled to recover the sum of $45.22 on account of the tax paid for the year 1913."

The defendant duly excepted to said finding and ruling.

The court issued the following order:—

"Judgment will be entered for the plaintiffs in the sum of $9,554.07, with interest from October 11, 1916."

The defendant duly excepted to said order.

And the defendant, being aggrieved by said rulings, findings, order and refusal to rule, files this his bill of exceptions and prays that it may be allowed.

LEO A. ROGERS,
Special Assistant U. S. Attorney.

Plaintiffs' Substituted Bill of Exceptions.

[Draft Bill Filed August 14, 1917; Substituted Bill of Exceptions Filed September 20, 1917; Allowed September 21, 1917.]

This was an action at law to recover from the Collector certain Federal income taxes assessed to the plaintiffs under the Act of Congress of October 3, 1913, in respect of the years 1913, 1914 and 1915, and which taxes were paid by the plaintiffs to the defendant as Collector, under protest.

The taxes in issue were assessed to the plaintiffs as an "association" within the terms of the act. The plaintiffs claimed that they
39 were not in any sense an association within the meaning of the act, and that they did not represent such an association, but that they were trustees strictly, so called, acting under a written declaration of trust and taxable under the Act of Congress only as fiduciaries.

The agreed statement of facts is by reference made part hereof.

The issues came on for trial at the March Term, 1917, before the Honorable George H. Bingham, jury trial having been duly waived.

Upon the trial it was duly made to appear that the plaintiffs had paid for the year ending December 31, 1913, a tax of $45.22, for the year ending December 31, 1914, a tax of $3,840, and for the year ending December 31, 1915, a tax of $6,990.18; that each of such payments was made under protest, that the plaintiffs had duly claimed refund of the same, which claims had been denied, and that all formalities required by statute before bringing this suit have been duly observed by the plaintiffs.

It also appeared in evidence that the paintiffs, in respect of the taxable year 1915, and if properly taxable as fiduciaries, would have been liable to a tax for that year amounting to $1,321.33, and that the plaintiffs had made due return under the act as fiduciaries and showing a liability to taxation for that amount.

No assessment of tax on this return had ever been made, the Government requiring from the plaintiffs a later return as an association, upon which later return the assessment of $6,990.18 was made and paid.

The defendant claimed the right to set off against the plaintiffs' claim for the $6,990.18, if sustained, the amount which, in the event of their being lawfully taxable as fiduciaries, would be due from them to the Government in respect of the year 1915, and requested a finding and ruling to that effect, as follows: "If the plaintiffs

were taxable as trustees only, they can recover for the year 1915 only the sum of $5,668.85 with interest thereon from October 1, 1916," which finding and ruling was granted and made by the court, and a finding was made and judgment accordingly ordered by the court for the plaintiffs in respect of the tax for the year
40 1915, for the sum of $5,668.85, being the amount of $6,990.18 claimed by the plaintiffs, less the said sum of $1,321.33.

Exceptions were duly taken and saved to the plaintiffs to the said ruling and action of the court.

The plaintiffs pray that this their bill of exceptions may be allowed.

By their Attorneys,

——— ———.
——— ———.

Duly presented to Bingham, J., on September 21, 1917, and within the time duly extended within which such bill of exceptions might be properly so presented.

And inasmuch as the foregoing matters of fact and law and the said exceptions do not appear by judgment record in this case, therefore, on the prayer of the plaintiffs' counsel, after hearing the defendant's counsel, the foregoing has been settled and signed by the judge who tried the same as and for the plaintiffs' bill of exceptions in the above-entitled cause on this twenty-first day of September, 1917.

Allowed.

GEORGE H. BINGHAM,
Circuit Judge.

Opinion and Finding of the Court.

July 6, 1917.

BINGHAM, *J.:*

This section is brought by Alvah Crocker, Charles T. Crocker, John J. Riker, Samuel E. M. Crocker and Isaac T. Burr, as trustees under an agreement and declaration of trust dated March 29, 1912, against John F. Malley, Collector of Internal Revenue for the Third District of Massachusetts, to recover three several sums with interest from October 11, 1916, which they were required to pay and did pay under protest as income taxes, to wit: $45.22 for the year 1913, $3,840 for the year 1914, and $6,990.18 for the year 1915. The tax was assessed under the Income Tax Act approved October 3, 1913 (38 Stat. at Large, 114, 166). The plaintiffs are the trustees named in the declaration of trust, with the exception of Isaac T. Burr, who has succeeded Felix Rackemann, resigned, as trustee.

41 All the formalities required by the statute — enable the plaintiffs to bring this suit have been complied with.

The trust was created under the common law. In its inception there were five trustees and eight beneficiaries, five of whom were

trustees. The property of the trust consisted of real estate and shares of stock in a Massachusetts corporation, the legal title to which was vested in the trustees. The real estate was leased to the Massachusetts corporation, and the income of the trust came from the dividends on the stock and the rentals of the real estate. Certificates were issued by the trust to the beneficiaries in proportion to their respective interests in the property held by the trust. The certificates contained a provision signifying the assent of the beneficiaries to the terms of the trust agreement.

The principal question in the case is whether the plaintiffs are trustees and subject to the tax provisions of Section II, subdivision D, of the Act of October 3, 1913, or whether they are an association within Section II, subdivision G (*a*), of said act. The contention of the defendant is that the plaintiffs are an association and taxable under the provisions of subdivision G, while that of the plaintiffs is that they are a strict trust, not an association or partnership, and are subject to the tax provisions of subdivision D.

According to the trust agreement, the trust was to continue for twenty years from and after the death of the survivor of certain persons named, when the property was to be converted into money and the net proceeds distributed among the persons then holding and owning the beneficial interests therein. Pending final conversion and distribution of the property full management and control of the same was vested in the trustees with as full powers as though they were themselves sole and absolute beneficial owners thereof in fee simple. They were authorized to collect and receive all rents and incomes from the property and semi-annually or oftener to distribute such portion thereof as they, in their discretion, should determine to be fairly distributable as income to the several cestui que trusts, according to their interests. The compensation of the trustees was not to exceed a total of one per cent, reckoned upon the gross income received, "unless, at any time, a majority in interest of
42 the cestui que trusts consent in writing to some larger compensation for any past service." Any vacancies in the office of trustee were to be filled by the remaining trustees by an instrument in writing signed by them and assented to in writing by the holder or holders of a majority in amount of the beneficial interests in the trust; and the terms and provisions of the trust could be modified at any time by an instrument in writing signed, sealed and acknowledged "by the then trustees, assented to in writing by a majority in interest of the cestui que trusts." It was also stipulated that the cestui que trusts should "be trust beneficiaries only, without partnership, associate or any other relation whatever inter sese."

In Williams v. Milton, 215 Mass., 1, the court had under consideration substantially the same question as the one here presented and the provisions of the trust agreement were practically the same, one of which read as follows: "The trustees may, with the consent of three fourths in interest of the cestuis que trustent, alter or add to this Declaration or terminate this Trust, and if it seems to them judicious so to do, they may, with like consent, convey the Trust Fund to new or other Trustees, or to a corporation, being

first duly indemnified for any outstanding obligation or liability. * * *" And it was held that the trust instrument created a strict trust in which the property was the property of the trustees; that the trustees were not the agents or subject to the control of the beneficiaries, but were the masters, and must be taxed as a trust and not as an association or partnership.

May 23, 1914, Judge Hale, sitting in this court in the case of Crocker v. Crocker, an action involving a consideration of the present trust agreement, decided that the trustees held and managed the trust property strictly as trustees and not as an association or partnership and were taxable under the Act of October 3, 1913, as fiduciaries.

In deference to these decisions and the authorities upon which they were based, I feel constrained to hold that the plaintiffs are a trust and not an association and are subject to the tax provisions of Section II, subdivision D, of the Act of October 3, 1913.

No contention is made but that, if the plaintiffs were taxable
43 as a trust, they should recover from the defendant on account of the tax paid for the year 1914 the sum of $3,840 and on account of the tax paid for the year 1915 the sum of $5,668.85. Some objection is raised to their recovering the sum of $45.22 paid for the year 1913, on the ground that, in returning the tax, certain deductions were made from the net income which should not have been. As to this objection it may be said that the law expressly relieved the plaintiffs from retaining the tax on the $130,666.66 of rentals received and paid over to the beneficiaries before November 1, 1913, and left it incumbent upon the Government to recover the tax on such sum from the beneficiaries themselves, which it probably has done; and, as to the $32,666.67 deducted, the evidence discloses that the plaintiffs made oath in their return that the tax on this sum had been retained at the source, which entitled them to make the deduction. I am therefore of the opinion that the plaintiffs are entitled to recover the sum of $45.22 on account of the tax paid for the year 1913.

The plaintiffs, as above stated, in 1915 were assessed as an association and paid a tax of $6,990.18. They should have been assessed as trustees and have paid a tax of $1,321.33. Having paid more that year than they should have, they are entitled to recover the difference, or $5,668.85.

The plaintiffs' requests for findings and rulings are granted; the first and third requests of the defendant for findings and rulings are denied, while the second is granted.

Judgment will be entered for the plaintiffs in the sum of $9,554.07 with interest from October 11, 1916.

Plaintiffs' Requests for Findings and Rulings.

The plaintiffs request the court to find as facts those statemen s which are embodied in the agreed statement of facts in the case.

The plaintiffs request the court to find that during the years 1913, 1914 and 1915 the plaintiffs were trustees under the trust instrument (Exhibit A attached to the declaration) and as such were strict

fiduciaries without association either among themselves or with any or all of their trust beneficiaries within the meaning of Section
44 II, sub-section G, of the Act of Congress of October 3, 1913.

The plaintiffs request the court to find that during each of the years 1913, 1914 and 1915 there was no "association" within the meaning of the Act of Congress of October 3, 1913, Section II, sub-section G, among any or all of the beneficiaries under the trust instrument (Exhibit A attached to the declaration) other than the trustees.

The plaintiffs request the court to rule as follows:—

1. The declaration of trust (Exhibit A attached to the declaration) by its terms and apart from any other considerations, established a strict trust, under which the trustees are properly taxable under the Federal Income Tax Act of October 3, 1913, as fiduciaries, and not otherwise; and there is no evidence in the case to change that result.

2. On all the evidence in the case there were no acts or deeds by or among the trustees under the declaration of trust (Exhibit A attached to the declaration), or any of the persons beneficially interested therein, which resulted in changing the character of the trust established by the declaration and making it other than a strict trust.

3. The provisions of the trust instrument (Exhibit A attached to the declaration), either of Article 10, providing that the trustees shall not receive compensation in excess of one per cent, unless consented to in writing by a majority in interest of the cestui que trusts; or of Article 11, providing that any vacancy shall be filled by the remaining trustees with the consent of a majority in interest of the trust beneficiaries; or of Article 13, providing that the terms of the trust may be modified by the then trustees, with the assent of a majority in interest of the cestui que trusts, nor of all of these provisions together, are not sufficient, as matter of law, to make the Wachusett Realty Trust, so called, anything other than a strict trust, or to make the trust beneficiaries associates, either inter sese or with the trustees themselves, within the meaning of Section II, sub-section G, of the Act of Congress of October 3, 1913.

4. On all the evidence the plaintiffs were liable under the
45 Act of Congress of October 3, 1913, to make returns and to taxation as fiduciaries, and not otherwise, in respect of the taxable years 1913, 1914 and 1915, and each of those years.

5. Unless there was some "association" among some or all of the beneficiaries under the trust instrument (Exhibit A attached to the declaration) other than the trustees, as such, the plaintiffs are entitled to recover in this action.

6. The Act of Congress of October 3, 1913, distinguishes between trusts, partnerships, strictly so called, and quasi partnerships. The latter are "associations" within the meaning of the act. The Wachusett Realty Trust is not, and was not in the years 1913, 1914 and 1915, a quasi partnership, and was not an "association" within the meaning of the act.

By their Attorneys,

DUNBAR & RACKEMANN.

Defendant's Request for Findings and Rulings.

The defendant requests the court to find and rule as follows:—

1. The Wachusett Realty Trust, which is represented by the plaintiffs in this action, was, during the years 1913 to 1915, inclusive, a joint-stock company or association within the meaning of Section 2-*g* (*a*) of the Act of October 3, 1913, and was taxable as such.

2. If the plaintiffs were taxable as trustees only, they can recover for the year 1915 only the sum of $5,668.85 with interest thereon from October 11, 1916.

3. If the plaintiffs are held taxable as trustees, still they cannot deduct the sum of $130,666.66, the amount of rentals received by them before November 1, 1913, in determining their taxable net income.

JAMES S. ALLEN, JR.,
Special Assistant U. S. Attorney.

46 *Defendant's Petition for Writ of Error and Assignments of Error.*

[Filed October 24, 1917.]

Now comes John F. Malley, Collector, defendant in the above-entitled cause, and says that on or about the twenty-fourth day of October, 1917, this court entered judgment herein, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the defendant which appear herein of record; and the defendant having duly excepted to the rulings by the court, makes the following assignments of error, and prays that a writ of error may issue to the District Court of the United States for the District of Massachusetts, returnable to the United States Circuit Court of Appeals for the First Circuit for the correction of the errors so complained of, and that the transcript of the record proceedings and papers in this cause which accompanied the writ of error sued out by the plaintiffs in this cause, and were sent with it to the United States Circuit Court of Appeals, may be incorporated by reference with this writ of error and referred to herein.

The errors asserted and intended to be urged are as follows:—

1. The court erred in ruling that the plaintiffs are a trust and not an association, and are subject to the tax provisions of Section 2, division D, of the Act of October 3, 1913.

2. The court erred in ruling that the plaintiffs were liable under the Act of October 3, 1913, to make returns and to be taxed as fiduciaries and not otherwise in respect to the taxable years 1913, 1914 and 1915.

The court erred in refusing to rule, upon defendant's request, that "if the plaintiffs are held taxable as trustees, still they cannot deduct the sum of $130,666.66, the amount of rentals received by

them before November 1, 1913, in determining their taxable net income"; and in ruling that "the law expressly relieved the plaintiffs from retaining the tax on the $130,665.66 of rentals received and paid over to the beneficiaries before November 1, 1913"; and in ruling that "the plaintiffs are entitled to recover the sum of $45.22 on account of the tax paid for the year 1913".

47 The Court erred in ordering that judgment be entered for the plaintiffs in the sum of $9,554.07 with interest from October 11, 1916.

JOHN F. MALLEY, *Collector.*
By GEORGE W. ANDERSON,
United States Attorney.

Plaintiffs' Petition for Writ of Error.

[Filed October 24, 1917.]

To the Honorable the Judge of the District Court for the District or Massachusetts:

Now come the plaintiff in the above-entitled cause and say that in the record and proceedings had in said cause, and also in the judgment rendered therein in the District Court of the United States, District of Massachusetts, at the September term thereof, A. D. 1917, on the twenty-fourth day of October, 1917, manifest error hath happened to the great damage of the said plaintiffs.

Wherefore said plaintiffs pray that a writ of error may be allowed and that a transcript of the record and proceedings in said cause may be sent to the United States Circuit Court of Appeals for the First Circuit, for the review of said judgment and the correction of said error.

Dated this — day of ——, A. D. 1917.

DUNBAR & RACKEMANN,
Attorneys for Plaintiffs.

Allowed.

Plaintiffs' Assignment of Errors.

[Filed October 24, 1917.]

Now come the plaintiffs in the above-entitled cause, who have filed herewith their petition for a writ of error to review the judgment heretofore entered in said cause on the — day of —— A. D. 1917, and file the following assignment of errors:—

I.

That the court erred in ruling as requested by the defendant that the plaintiffs were entitled to recover the sum of $5,558.85

48 only of the amount which they were compelled to pay as a Federal income tax for the year 1915, namely, the sum of $6,990.18.

II.

That the court erred in ruling that the defendant was entitled to set off against the plaintiffs' claim to recover the full amount which was assessed to them as an association as the Federal income tax for the year 1915, and which they paid under protest, the sum of $1,321.33, being the amount of the Federal income tax for said year which it appeared that the plaintiffs would have been liable to pay if assessed as fiduciaries.

III.

That on the facts found the court erred in ordering judgment for the plaintiffs for only the sum of $9,554.07 with interest from October 11, 1916.

IV.

That on the facts found the court erred in not ordering judgment for the plaintiffs for the full amount claimed by them, namely, the sum of $10,875.40, with interest from said October 11, 1916.

DUNBAR & RACKEMANN,
Attorneys for Plaintiffs.

Waiver of Bond.

[Filed October 26, 1917.]

It is hereby agreed in the above-entitled action that the bond on the writ of error be waived.

DUNBAR & RACKEMANN,
Attorneys for Plaintiffs.
THOMAS J. BOYNTON,
United States Attorney.
LEWIS GOLDBERG,
Assistant United States Attorney.

49 *Plaintiffs' Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

[L. S.]

The President of the United States to John F. Malley, of Boston, in the District of Massachusetts, as Collector of Internal Revenue for Third District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the 28th day of November next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts wherein Alvah Crocker and Charles T. Crocker, both of Fitchburg in said

District of Massachusetts, John J. Ricker, of the City of New York in the State of New York, Isaac T. Burr of Milton in the District of Massachusetts, and Samuel E. M. Crocker of said Fitchburg, Trustees under Declaration of Trust, dated March 29th, 1912, known as "The Wachusett Realty Trust", plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George H. Bingham, Circuit Judge duly assigned to hold the District Court of the United States for the District of Massachusetts this thirtieth day of October, in the year of our Lord one thousand nine hundred and seventeen.

GEORGE H. BINGHAM,
U. S. Circuit Judge.

Acknowledgment of Service of Plaintiffs' Citation.

Service of the within citation is hereby accepted.
By his Attorney-,

THOMAS J. BOYNTON,
United States Attorney.
LEWIS GOLDBERG,
Assistant U. S. Attorney.

50 *Defendant's Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Alvah Crocker and Charles T. Crocker, both of Fitchburg, in said District of Massachusetts; John J. Ricker, of the City of New York, in the State of New York; Isaac T. Burr, of Milton, in the District of Massachusetts, and Samuel E. M. Crocker, of said Fitchburg, Trustees under Declaration of Trust, dated March 29th, 1912, known as "The Wachusett Realty Trust," Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the 28th day of November next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts wherein John F. Malley, of Boston, in the District of Massachusetts, as Collector of Internal Revenue for the Third District of Massachusetts, plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George H. Bingham, Circuit Judge duly

assigned to hold the District Court of the United States for the District of Massachusetts this thirtieth day of October, in the year of our Lord one thousand nine hundred and seventeen.

GEORGE H. BINGHAM,
U. S. Circuit Judge.

Acknowledgment of Service of Defendant's Citation.

Service of the *written* citation is hereby accepted this third day of November A. D. 1917.

FELIX RACKEMANN,
DUNBAR & RACKEMANN,
Attorneys for Defendants in Error.

51-52 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record and proceedings in the cause entitled, No. 823, Law Docket. Alvah Crocker et al., Trustees, Plaintiffs, v. John F. Malley, Collector, Defendant, in said District Court determined, Defendant's Bill of Exceptions, Plaintiffs' Substituted Bill of Exceptions, Opinion and Finding of the Court, July 6, 1917, Plaintiffs' Petition for Writ of Error, Plaintiffs' Assignment of Errors, Defendant's Petition for Writ of Error and Assignments of Error, Waiver of Bond, and also the original Citations issued upon the appeal of both the plaintiffs and defendant, with the Acceptances of Service thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said district, this twenty-third day of November, A. D. 1917.

[SEAL.] JAMES S. ALLEN, *Clerk.*

53 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1323.

ALVAH CROCKER et al., Trustees, Plaintiffs, Plaintiffs in Error,

v.

JOHN F. MALLEY, Collector, Defendant, Defendant in Error.

No. 1324.

JOHN F. MALLEY, Collector, Defendant, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

Error to the District Court of the United States for the District of Massachusetts.

Before Dodge, Johnson and Aldrich, JJ.

Opinion of the Court.

May 3, 1918.

DODGE, *J.*:

These cases arise under the Federal Income Tax Act, approved October 3, 1913 (38 Stats. 166, 172).

The five persons who were then the trustees under a declaration of trust dated March 29, 1912, and recorded in the Worcester County, Massachusetts, Northern District, Registry of Deeds, brought suit, on January 15, 1917, against the Collector of Internal Revenue to recover back certain amounts paid by them to him under
54 protest, as income taxes claimed by him to be due from them under said act, for the years 1913, 1914 and 1915. The case was heard in the District Court without a jury on an agreed statement of facts. The trustees recovered judgment for $9554.07, with interest; which judgment the collector seeks to reverse in No. 1324, asserting that the allowance of any recovery was error. By their writ of error in No. 1323, the trustees assert the judgment to have been erroneous in not allowing also the further recovery of $1321.33, included in their total claim as stated in their declaration. Neither party disputes the finding below that all the formalities required by the statute to enable the plaintiffs to bring this suit have been complied with.

The declaration of trust provided that "the title of this trust (fixed for convenience) shall be The Wachuset Realty Trust." The important features of the trust thereby created are set forth as follows, in the "Opinion and Findings" of the District Court:—

"The trust was created under the common law. In its inception there were five trustees and eight beneficiaries, five of whom were trustees. The property of the trust consisted of real estate and shares of stock in a Massachusetts corporation, the legal title to which was vested in the trustees. The real estate was leased to the Massachusetts corporation, and the income of the trust came from the dividends on the stock and the rentals of the real estate. Certificates were issued by the trust to the beneficiaries in proportion to their respective interests in the property held by the trust. The certificates contained a provision signifying the assent of the beneficiaries to the terms of the trust agreement.

* * * * * * *

"According to the trust agreement, the trust was to continue for twenty years from and after the death of the survivor of certain persons named, when the property was to be converted into money and the net proceeds distributed among the persons then holding and owning the beneficial interests therein. Pending final conversion and distribution of the property full management and control of the same was vested in the trustees with as full powers as though they were themselves sole and absolute beneficial owners thereof in fee simple.

55 They were authorized to collect and receive all rents and incomes from the property and semi-annually or oftener to distribute such portion thereof as they, in their discretion, should determine to be fairly distributable as income to the several cestui que trusts, according to their interests. The compensation of the trustees was not to exceed a total of one per cent, reckoned upon the gross income received, 'unless, at any time, a majority in interest of the cestui que trusts consent in writing to some larger compensation for any past service.' Any vacancies in the office of trustee were to be filled by the remaining trustees by an instrument in writing signed by them and assented to in writing by the holder or holders of a majority in amount of the beneficial interests in the trust; and the terms and provisions of the trust could be modified at any time by an instrument in writing, signed, sealed and acknowledged 'by the then trustees, assented to in writing by a majority in interest of the cestui que trusts.' It was also stipulated that the cestui que trusts should 'be trust beneficiaries only, without partnership, associate or any other relation whatever inter sese.'"

The District Court has stated the question upon which the trustees' right of recovery depends, as follows:—

"The principal question in the case is whether the plaintiffs are trustees and subject to the tax provisions of Section II., Subdivision D, of the Act of October 3, 1913, or whether they are an association within Section II., Subdivision G (*a*), of said act. The contention of the defendant is that the plaintiffs are an association and taxable under the provisions of Subdivision G, while that of the plaintiffs is that they are a strict trust, not an association or partnership, and are subject to the tax provisions of Subdivision D."

This question was resolved by the District Court in favor of the

plaintiffs, and the case decided upon the ground that they are a trust and not an association.

Under the Corporation Exise Tax statute of 1909 (36 Stats. 11, 112), every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares,—now or hereafter organized under the laws of the United States or of any state or territory, etc., was made subject, if engaged in business in any state, etc., to pay annually a special excise tax with respect to the carrying on or doing business by it, of one
56 per cent upon its entire net income over and above $5,000 received by it from all sources during the year.

In Eliot v. Freeman, 220 U. S. 178, it was held with regard to two Massachusetts real estate trusts, more or less similar in character to the trusts here under consideration, that they were not within the provisions of the act nor liable to the excise tax thereby imposed because formed in a state where statutory joint stock companies are unknown and not therefore deriving either from the laws of the United States or of any state or territory, etc., any quality or benefit not existing at the common law. The intention of Congress was held to have been to embrace within the statute only such corporations and joint stock associations as were organized under some statute or did derive from that source some quality or benefit not existing at the common law.

This decision was in 1911. The language of the subsequently enacted Income Tax statute of 1913 imposes the normal tax therein provided for upon the entire net income of every corporation, joint stock company or association,—organized in the United States, no matter how created or organized.

If, therefore, The Wachuset Realty Trust is a joint stock company or association, within the meaning of those terms as used in Sec. II., G. (*a*), of the statute of 1913, it makes no difference whether it is created or organized under any statute or not. Being organized in the United States its income is liable to the tax imposed, although it derives no benefit not existing at common law from any statutory source. The question remains, however, whether or not the facts before the District Court required the finding that it was a "joint stock association" or "association" such as the above section intends. We find no indication in Eliot v. Freeman or in any other Supreme Court decision that a Massachusetts trust like those before the court in that case must necessarily be regarded as such an "association" in the statutory sense. On the collector's behalf it is said that in the legislation of 1913 Congress "intentionally omitted the
57 one requirement which exempted such an organization" under the legislation of 1909. But we think it by no means clear from anything said in the opinion that either trust before the court in Eliot v. Freeman must have been held an "association" in the statutory sense, had it only been organized under some statute expressly permitting such organization. In the opinion it is expressly said, as to the trusts then under consideration, that they could "hardly be said to be organized within the ordinary meaning of that term" (220 U. S. 186), and it was pointed out (at p. 187)

that they did not have perpetual succession, but ended twenty years after lives in being,—suggestions which would hardly have been made if the decision was meant to be understood as contended.

With regard to the statute of 1909 it is to be noticed that while corporations, joint stock companies, or associations and insurance companies, were therein classed together as they are in the statute of 1913,—the former statute, unlike the latter, imposed upon them not a tax upon their incomes as such, but a "special excise tax with respect to the carrying on or doing business by them," equivalent to one per cent upon their net incomes in excess of $5,000. Upon partnerships, not capable of being included in said classification, the statute of 1909 did not undertake to impose any such tax, any more than upon individuals. The incomes of the partners from the business of an ordinary partnership Congress could not have taxed in 1909; the sixteenth amendment not having become a part of the constitution until February 25, 1913.

The statute of 1913, however, imposes a tax directly upon net incomes, not a special excise tax equivalent to the same percentage. It imposes such tax directly upon the incomes of individuals and partnerships, as well as those of corporations, joint stock companies or associations and insurance companies, according to provisions alike in principle as to all said incomes, however different as to matters such as the different amounts of exemptions or deductions allowed different classes of recipients. The provisions of Sec. II, G (*a*), which subject the incomes of corporations, joint stock companies or associations and insurance companies to the tax, are there expressly declared not applicable to partnerships. In Sec. II, D, are found separate and distinct provisions which expressly direct that persons carrying on business in partnership shall be liable for income tax only in their individual capacities, and which regulate accordingly the returns of incomes required to be made by partnerships.

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No provisions are found in the statute of 1913 which directly impose a tax upon incomes arising or accruing to fiduciaries, in terms corresponding to those whereby a tax is imposed upon incomes arising or accruing to individuals (Sec. II, A-1) or to corporations, joint stock companies or associations, etc. (Sec. II, G-*a*). By Sec. II, D, in a paragraph mainly devoted to setting forth requirements of annual returns from or on behalf of the various classes of recipients of taxable income, trustees, among other specified kinds of fiduciaries, "and all persons, corporations or associations acting in any fiduciary capacity," are required to make such returns of—

"the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals."

The provisions just referred to seem to be rather provisions for the assessment and collection of the taxes due from the different classes of recipients of incomes elsewhere directly taxed by the statute, than provisions creating still another class of recipients and imposing a tax upon incomes arising or accruing to them. Nowhere in the statute

are incomes arising or accruing to fiduciaries declared subject as such to the provisions taxing incomes arising or accruing to individuals.

In view of the above features of the statute, the first question presented in determining its application to these trustees seems to be as follows: Is the income received by them during each calendar year from the property under their control to be considered income arising or accruing to the "persons for whom they act," or as income arising or accruing to them, notwithstanding that it is to be disposed of by them as the trust declaration requires? If it is
59 to be regarded as income of the former description, i. e., as arising or accruing to the respective beneficiaries, the above provisions of Sec. II., D, require an annual return of it from them, and they are liable to pay the tax imposed upon it by a clause in the same paragraph subjecting them to all the provisions of the section applicable to individuals; but under subsequent provisions of Sec. II., D, they need not include in their returns so much of said income as is derived from dividends upon the stock forming part of the property under their control. But if said income is to be considered as "arising or accruing" to them rather than to the beneficiaries or certificate holders, none of the above provisions of Sec. II., A, or of Sec. II., D, seem to us applicable either to said income or to them. Though arising or accruing to them as trustees or title holders of the property from which it is derived, they do not, and could not, claim such income as their own, in any individual capacity; and if they do not receive it as income subject to the tax because it has arisen or accrued to the several beneficiaries, it must be either income arising or accruing to them collectively as the receiving officers of their organization, and subject to the tax imposed by Sec. II., G-*a*, upon incomes of the different class there dealt with, from which dividends may not be deducted, or income upon which no tax is imposed by any express and distinct provisions of the statute.

In order to make income from a trust estate received by the fiduciary in any calendar year, income of the person for whom he acts, subject to the tax, in the sense of the above provisions of Sec. II., D, it must be received by the fiduciary upon terms which make it income arising or accruing during that year to such person according to Sec. II., A-1. If the terms of the trust are such that its receipt by the fiduciary immediately renders it, or so much of it as is net income, available as such to the beneficiary, no difficulty is found in regarding it as income of the person for whom the fiduciary acts, subject to the tax, coming into his custody or control and management, and therefore governed by said provisions of Sec. II., D.

But by the terms of the trust here in question the receipt by the trustees during a given calendar year of income from the trust
60 estate does not render any part of such income immediately so available to the beneficiaries as income arising or accruing to them during the year. Such receipt gives to no one of them any right to a share of what the trustees so receive as then belong-

ing to him individually, or any right to direct the disposition of any such share according to his individual determination.

The plaintiffs were not required by the trust declaration under which they received the income from the trust estate for the calendar years here in question to distribute it, or any part of it, to the beneficiaries, as net income, at any time. The requirements as to distribution are only that they distribute such portion of the income received "as they may in their discretion determine to be fairly distributable net income." And they are given full authority from time to time to devote any funds on hand, whether received as capital or income, to repair, improvement, protection or development of the property under their control, or to the acquisition of other property, as they "may determine to be wise and expedient for the protection and development of the trust property as a whole pending its conversion and distribution." Further, their determination is expressly made final, if made by them in good faith, as to all questions as between capital and income.

No beneficiary of this trust, therefore, had the right, when the income for a given calendar year from the trust property came into the plaintiffs' hands, to demand any share of it or direct the disposition of any of it or even to have his individual share of it determined. To the plaintiffs, and not to their beneficiaries, belonged the right to say whether any of it should then go to the beneficiaries or whether all of it should become part of the trust property ultimately to be distributed. In such final distribution no one who was a beneficiary during the calendar year might live to share. While the value of his proportionate interest in the trust estate might be increased if income for the year went to augment said estate, his proportionate share in income so disposed of can hardly be called income arising or accruing to him as an individual during the year, in the ordinary sense. We think it may well be doubted
61 whether income, received by the plaintiffs subject to such independent power of disposition, or any part thereof, is income within the meaning of the language in Sec. II., D, "the net income of the person for whom they act, subject to this tax, coming into their custody or control and management."

The plaintiffs' powers and functions as defined by the instrument under which they act resemble the powers and functions ordinarily exercised by the managers of an organization so constituted as to be of itslf a recipient of taxable income independently of the individuals beneficially interested in the property from which it is derived, much more than they resemble the powers and functions of ordinary judiciaries acting merely as such for ordinary beneficiaries. Particularly is this true as to income received from their trust estate. Until and unless, after its receipt, they have so exercised their discretion as to determine it, or some part of it, to be fairly distributable net income, no individual for whom they act can claim any part of it as his income, as distinguished from the income of the organization to which he belongs. The same is true of a corporation's income, in which stockholders can claim no individual right before the managers declare a divi-

dend from it. The same would be true of a corporation, joint stock company or association which had given to its officers powers of disposition over its income like the above. The same would not be true in the ordinary cases of fiduciaries exercising, with regard to income, only the powers necessary for distributing net income as received to the persons for whom they act, such as we think were contemplated by the above provisions of Sec. II., D.

It is true, as the agreed statement before us shows, that the plaintiffs "have disbursed such income" as they have from time to time received from the real estate and stock which they hold, "less charges and disbursements for taxes and similar expenses, to their several beneficiaries in proportion to their respective interests." This we understand to mean that they have distributed so much of the income received by them during the calendar years here in question as they determined, in their discretion, to be fairly distributable net income; according to Clause 3 of the declaration of trust.
62 But in said distributions the respective beneficiaries can hardly to be said to have got what they received because it had arisen or accrued to each of them during the year; or the plaintiffs to have been performing only the duty of paying over net incomes so arising or accruing. Each beneficiary took what he received, not because it was his net income so arising or accruing, but because the plaintiffs had elected to treat what they distributed as "fairly distributable net income," instead of accumulating it as they might have done.

The District Court, as its opinion states, held the plaintiffs to be "a trust" subject to the provisions of Sec. II., D, and not "an association," in deference to the decisions in Williams v. Milton, 215 Mass. 1; Crocker v. Crocker, previously decided in the District Court (May 23, 1914), and the authorities whereupon those decisions were based. Crocker v. Crocker required construction by the Court of the same trust declaration as is now before us. The bill in that case, filed by one of the beneficiaries, asked the court to enjoin the present plaintiffs from making a return of income taxable under this statute according to Sec. II., G-*a*, thereof.

We agree with the District Court, in this case and in Crocker v. Crocker, that the organization formed under this trust declaration is not, in view of the authorities referred to, to be regarded as an association in such sense as to make the beneficiaries partners and the plaintiffs their agents for conducting the partnership business. Its income, therefore, for the calendar years in question, is not for the purpose of the statute to be treated as income of a partnership. If it were to be so treated it would be income arising or accruing to the several partners and subject to the provisions of Sec. II., D, regarding such income. Nor could the organization be regarded as belonging to either of the classes mentioned in Sec. II., G-*a*, because the language there used expressly excludes partnerships.

But although their beneficiaries stood, neither as to the trust property, nor as to the profits of its control and management, nor as to the income therefrom, as partners, but only as beneficiaries of a strict trust; and although the plaintiffs were not the agents

63 or representatives of a partnership, but trustees in whose management and control of the trust property and business the beneficiaries had no direct voice, we do not think it necessarily follows that the organization composed of themselves and the individuals for whose benefit they act cannot be called an "association" for the purposes of Sec. II., G-*a*. Though not associated as partners, we fail to see why they may not reasonably be said to be associated in the sense contemplated by the statute. As pointed out above, the statute, for the purposes of the taxation which it imposes, broadly distinguishes between two classes of income only,—that which does and that which does not arise or accrue to individuals as opposed to groups or bodies of individuals.

The plaintiffs fail to satisfy us that the terms "voluntary association" or "association" are entirely inapplicable for any purpose to an organization according to whose constitution individuals beneficially interested in various proportions in the same property, commit its control and management, for profit, to trustees free from their own immediate control or interference. However important it may be to distinguish between a trust under which there is no partnership relation among the beneficiaries, and an association under which such relation exists, for the purposes of systems of taxation such as that of Massachusetts (Williams v. Milton, 215 Mass. 1), or for the purposes of statutes such as that construed in Smith v. Anderson, 50 L. J. Ch. 39; it does not seem to us that the distinction so made necessarily excludes an organization like this from the general class of organizations to which the terms "voluntary association" or "association" may properly be applied. The holders of the assignable certificates representing the different beneficial interests in this "trust" may certainly be described, without using language in any extraordinary or unusual sense, as associated together for their common benefit or profit. Their individual interests in the trust property are combined for the purposes of a joint business venture managed for the common benefit of all. The trust declaration in effect associates them for the purposes of allowing extra compensation to the trustees, of filling vacancies in the office of trustee, or of modifying the
64 terms of the declaration itself, when it requires for those purposes written assent from a "majority in amount" or a "majority in interest."

Believing, in view of the entire scheme for taxation of incomes as established by this statute, that the legislative intent as to incomes such as these plaintiffs have received, was to treat them as arising or accruing to the trustees collectively, rather than to the individual beneficiaries for whose ultimate benefit they were received, we are obliged to hold that the taxes for the years here in question were lawfully assessed and collected, and that the District Court erred in its decision to the contrary. This conclusion renders it unnecessary to consider the questions which would have had to be decided upon the plaintiffs' writ of error No. 1323, had we agreed with the District Court.

In No. 1323, the writ of error is dismissed, and the defendant in error recovers his costs of appeal.

In No. 1324, the judgment of the District Court is reversed, and the case is remanded to that court, with directions to enter judgment for the defendant; and the plaintiff in error recovers his costs of appeal.

65 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1323.

ALVAH CROCKER et al., Trustees,

v.

JOHN F. MALLEY, Collector.

No. 1324.

JOHN F. MALLEY, Collector,

v.

ALVAH CROCKER et al., Trustees.

Petition for Rehearing.

To the Honorable the Justices of the United States Circuit Court of Appeals for the First Circuit:

Come now Alvah Crocker and others, Trustees, and respectfully petition the Court for a rehearing in the above-entitled causes, in which the Opinion of the Court was rendered by Mr. Justice Dodge May 3, 1918, whereby it was ordered that,

"In No. 1323 Writ of Error is dismissed and the defendant in error recovers his costs of appeal."

"In No. 1324 the judgment of the District Court is reversed, and the case is remanded to that Court with directions to enter judgment for the defendant; and the plaintiff in error recovers his costs of appeal"—

66 and without intended argument beg leave to state briefly the reasons for this request.

1. As we understand the Opinion of the Court, its decision really turned on its determination that the Statute in question (Act of October 3, 1913) "for the purpose of the taxation which it imposes, broadly distinguishes between two classes of income only; viz: that which does, and that which does not arise or accrue to individuals as opposed to groups or bodies of individuals" (see Opinion, page 11); and that unless The Wachusett Realty Trust were held an association subject to the tax imposed by Section II, G, (*a*), the income in question would not be taxable at all. (See Opinion, middle page 7.)

While it is true that the brief and argument of the U. S. Attorney did contend that the income, in the cases at bar, was "association"

rather than "individual" income, it is also true that the idea that any such income would wholly escape taxation except upon the "association" theory was not mentioned or referred to in the briefs or argument; in other words, the backbone of the Opinion has never been discussed by counsel.

The District Court, as mentioned in the Opinion (page 3), stated the question as merely whether the plaintiffs were taxable as fiduciaries, under Subdivision D., or as an Association, under Subdivision G, (*a*), Section II.

This alternative was the only one which counsel considered as before this Court, and it is perhaps significant that the Department originally assessed and collected taxes from the plaintiffs as fiduciaries for 1913 and 1914 under Subdivision D.

2. The decision adopts a theory of construction of the Statute which is entirely contrary to the Treasury Regulations, and
67 the practice of the Treasury Department for years, and means that millions of dollars have been assessed as income taxes and collected unlawfully.

Such a theory is one which the Court would finally adopt only with a great natural reluctance. Under it immense amounts of income would have entirely escaped taxation, contrary to the whole clearly avowed purpose and intent of the Act.

This theory is that only two classes of income are taxable, viz.: (*a*) individual incomes to which ascertained individuals are absolutely and unconditionally entitled; and (*b*) the incomes of some forms of organization *of* association, corporate or not.

This theory would exclude from taxability under the Act all the income, (*a*) of funds for accumulations;—(*b*) of funds under all spendthrift trusts;—(*c*) of funds held in strict trust for maintenance of various objects;—(*d*) of all family trusts under wills for "support" of widows, or the "education and support" of children;—and (*e*) of all income of estates in process of settlement. Surely in none of these could any "Association" theory be adopted.

It was not the intent of Congress that all such incomes should go untaxed, and it is common knowledge that, in fact, they have not gone untaxed.

The Court will surely say only with great hesitation and with no reasonable alternative that the Government has, for these several years, collected the income taxes on all the foregoing unlawfully, and that in all pending cases for refund of such taxes, the Government must restore.

3. It is respectfully submitted that the Court failed to give due consideration to the "Regulations" which were made and practised and enforced under the authority of the Act of October 3, 1913, and which became crystallized in the Act of September 8, 1916, Title I, Part I, Sec. 2 (*b*), as follows:

68 "Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn

or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be."

It was under these regulations and other similar rulings (and the forms prescribed in accordance therewith) that millions of dollars in income taxes were assessed by the Government, and have been, in most part, paid; and it is, perhaps, not too much to say that, in general, the regulations as promulgated, and the requirements of the Treasury Department as made, have been, since 1913, universally recognized as being within the power of the Act, and as carrying out the spirit and intent expressed in Section II, A., Subdivision 1, of the Act of October 3, 1913 (its opening paragraph), which reads as follows:

A. Subdivision 1. "That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax," etc., etc.

In all the cases above enumerated, that is, of trust funds for accumulations;—spendthrift trusts;—trusts for object maintenance;—trusts for the support of widows and children;—and estates in process of settlement, it might have been quite proper and warranted had the Department taken the position simply that, in all such cases, it was "net income arising or accruing" to the trustee, executor,
69 or administrator personally, as in him personally rested full title to the property producing the income and all powers of control and management.

Perhaps, for convenience, so as to preserve the "fiduciary" earmark, the Department, by its regulations, adopted the fiction that in such cases the "trust," or the "object," or the "fund," or the "estate," should be regarded as the recipient and beneficial entity, while it might have said that the trustee or executor, being the owner of the property, was also the owner of its income, and taxable personally as such.

All these Treasury Regulations and rulings will not be quoted or discussed at length here, as brevity is expected in a Petition of this kind, but a few may be mentioned.

Article 74 of Regulations No. 33, dated January 5, 1914, provided for the tax to fiduciaries "having control of any portion of an annual income accruing during the year," for beneficiaries having a distributive interest, but the income not being distributed or paid over.

T. D. 2231 (superseding original Art. 70 of Regulations No. 33) provided, generally, that guardians, trustees, executors, etc., and all persons acting in any fiduciary capacity, who hold in trust an estate of any other person or persons, shall be designated the "source," "for the purpose of collecting the income tax." It then provided as follows:

"Fiduciaries shall, on or before March 1 of each year, make and render a return, in form prescribed by the Commissioner of Internal Revenue, of the income coming into their custody or control and management from each trust estate when the annual interest of any beneficiary in the income of said trust estate subject to the normal tax is in excess of $3,000, and also when the undistributed income of the estate (as an entity or beneficiary in and of itself for tax purposes), consisting of income from dividends of corporations and other income (or of dividends alone), shall exceed $20,000. In such cases the estate shall be reported as a beneficiary for the undistributed income."

70 and also—

"The income of trust estates, as any other income, is subject to the income tax. When such income is received annually by a beneficiary of an estate the fiduciary will withhold the normal tax due and subject to withholding by him. Any part of the annual income of trust estates not distributed becomes an entity and, as such, is liable for the normal and additional tax, which must be paid by the fiduciary."

T. D. 2231 was amended by T. D. 2289 to read as follows:

"T. D. 2231 is hereby amended to provide that fiduciaries having control of any portion of income accruing during the year to known beneficiaries other than trust estates, as provided in T. D. 2231, but not distributed or paid to the beneficiaries during the year, shall, in rendering their annual return (Form 1041) give the name and address of each of said beneficiaries having a distributive interest in said income, and shall furnish all the information called for in such returns. In all such cases the fiduciary shall withhold and pay to the Collector, as provided by law, the normal tax of one per cent. upon the distributive interest of each of said beneficiaries, when such interest is in excess of $3,000, the same as if said income were actually distributed and paid to the beneficiaries," etc., etc.

Note, in the foregoing, that the fiduciary is to "withhold and pay." This declares him taxable. It was in accordance with such Treasury Decisions and Regulations that all such cases have been taxed for several years.

In letter of Commissioner Osborn to Corporation Trust Company, dated February 17, 1916, the Commissioner said: "Under T. D. 2231 an estate cannot be without a beneficiary for income tax purposes." The estate was regarded as the beneficiary. Or, in effect, the fiduciary (trustee, executor, etc.) was regarded as taxable in respect to income of the trust estate not distributed or distributable to some person entitled as beneficiary.

71 In letter of the Department, dated February 17, 1916, to Worthington, Strong & Stettinius, appeared the following:

"Upon the statement of the case in your letter: if any of the retained income is of a class subject to income tax, the fiduciary should make a return on Form 1041, and pay all taxes on such retained income in accordance with the provisions of Treasury Decision 2231."

Of course, all these regulations and all this practice relate to cases where there was the true fiduciary relationship. But the Opinion under consideration here clearly holds that there was such strict fiduciary relationship in the "Wachusett Realty Trust."

4. Article 79 of Regulations 33 is by no means overlooked. That Article provides:

"The terms 'joint stock companies,' or 'associations,' shall include associates, real estate trusts, or by whatever name known, which carry on or do business in an organized capacity, whether organized under and pursuant to State laws, trust agreements," etc., etc.

That Article 79 has full application to a very large number of organizations, but not to the Wachusett Realty Trust.

Note the words, "which carry on or do business in an organized capacity."

The facts in these cases are undisputed that, whatever the powers of the Trustees, there was no "business" carried on or done. The Trustees held only shares and real estate which was all leased for a long term. All net income was distributed. And while the five Trustees may be said to have been in a certain sense organized, the same cannot possibly be said of the trust beneficiaries either by themselves or with the Trustees, and they have no more to do with the property or its management than so many complete strangers.

72 As stated by Holmes, J., in United States v. Emery, 237 U. S., at p. 32: "The question is rather what the corporation is doing than what it could do, 228 U. S. 305-306," etc.

5. The Opinion treats the Wachusett Trustees and their strict cestui que trusts as being "organized," in an "Association" for the "carrying on or doing" of business.

It is respectfully submitted that the Court may have unwittingly failed to realize that many persons are or may be "associated" without any resulting "Associations." Husband and wife are intimately associated;—the soldiers of a regiment are associated;—so are the directors of a company;—but in none of these cases is there any resulting "Association" and certainly no such association as was meant in the Act of 1913; in which corporations, joint-stock companies, and associations are grouped, and evidently intended as organized bodies, at least as distinguished from mere chance results of personal intimacies or even community of interests.

As was said by the Supreme Court of the United States in Eliot v. Freeman, 220 U. S. 186, regarding the real-estate trusts there under consideration (which were clearly quasi-partnership associations), they could "hardly be said to be organized, within the ordinary meaning of that term," it being pointed out that they did not have perpetual succession "but ended twenty years after lives in being * * *" (See Opinion in these case, page 5.)

Unless there be a material distinction between the terms "unincorporated company" and "association," the decision in the cases at bar is contrary to the decision in the case, In Re Associated Trust, 222 Federal, 1012, decided by Mr. Justice Morton on the authority of Williams v. Milton, 215 Mass. 1, and other cases, because it was held in that case very clearly that, at the point in that case at which

the Associated Trust was just like the Wachusett Realty Trust in its final form, *"there is no organization having a distinct entity*
73 *apart from the trustee."* (Italics ours.)

In Re Associated Trust is not referred to in the Opinion in the cases at bar, though cited on plaintiffs' brief.

6. There is, perhaps, some possible significance in T. D. 2137, reading as follows:

"Private banks which have the form of corporate organizations, elect officers and a board of managers, have a distinctive name, a fixed situs, and distribute their net earnings upon the basis of the amount of capital invested by the members or owners, are held to be associations within the meaning of the Federal Income Tax Law, and in their organized capacity should make returns," etc., etc.

Attention is called to the emphasis apparently put upon the form of the organization and the election of officers and managers, which perhaps, is entirely in line with the apparent classification of the Act, wherein corporations, joint-stock companies, and associations are classed apparently as organizations having some similarity in general operating form and control, or in the form of organization itself, whether corporate or otherwise.

7. The Treasury interpretation and practice introduced no novelty in the tax law. It is, of course, well known that trustees and other fiduciaries are liable to suit, judgment, and execution against them personally for local taxes upon real estate held by them, and for State, County, and Municipal taxes on personalty held by them in trust, and for State taxes upon their trust incomes.

There is no embarrassment in practice. In all these cases, as under the Treasury Regulations, the trustee makes two or more returns, one as to his individual property (or income), the other, or others, as fiduciary. He is liable personally under each. He
74 pays both and is reimbursed from the trust estate any payments made as fiduciary.

He is "one individual," but, as decided by Mr. Justice Dodge (confirmed by later decision in Clarke v. Rogers, 228 U. S. 534), he may have two capacities with respective rights and liabilities. He may, as individual, even "prefer" himself as trustee within the Bankruptcy Act.

8. As recited in the Opinion (page 6) by Section II, D, of the Act of 1913, fiduciaries are required to make return of "the net income of the person for whom they act," etc., etc., "and be subject to all the provisions of this Section which apply to individuals."

Would it not be more reasonable to judicially construe this in connection with A, Subdivision 1 of the Act, (quoted on page 4 above) (and following the practical construction adopted and practiced by the Treasury Department) as making the Trustee personally liable for the income tax in respect of any undistributed income of the trust estate, rather than to construe as an "Association" persons who (even if "associated" in a rather loose general sense) have no functions, titles, or powers whatever in common, and who, if they met, could lawfully participate in no common action whatever; particularly when the former construction would leave no awkward

hiatus in the law, and when the latter construction does leave such hiatus and solemnly adjudicates that millions and millions of income have been unlawfully taxed through a period of years, on constructions and practices, which have been very universally believed to be lawful and proper?

9. It would seem a bit hard if these plaintiffs were now singled out to pay a double tax (on the dividends from the Corporation) under a theory of the construction of the Act now first announced, and at variance with the uniform practice of the Treasury
75–76 Department for nearly five years, without, at least, being heard in argument upon the precise question, necessarily and avowedly involved in the decision.

By their Solicitors and Attorneys,

DUNBAR & RACKEMANN.

FELIX RACKEMANN,
HARRISON M. DAVIS,
Of Counsel.

I, Felix Rackemann, of counsel in the above-entitled cases, hereby certify (under Rule 29) that, in my opinion, there is such probable ground for the foregoing Petition for Rehearing as to make it a fit subject for judicial inquiry and examination, and that the same is not intended or filed for delay, but only with great deference and with the conviction that matters of public as well as private interest are involved.

May, 1918.

FELIX RACKEMANN.

77 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1323.

ALVAH CROCKER et al., Trustees, Plaintiffs, Plaintiffs in Error,

v.

JOHN F. MALLEY, Collector, Defendant, Defendant in Error

No. 1324.

JOHN F. MALLEY, Collector, Defendant, Defendant in Error.

v.

ALVAH CROCKER, et al., Trustees, Plaintiffs, Defendants in Error.

Error to the District Court of the United States for the District of Massachusetts.

Before Dodge, Johnson and Aldrich, JJ.

Petition for Rehearing.

Rescript.

June 10, 1918.

Per Curiam:

The petitioners assert that our opinion herein, dated May 3, 1918, adopts a "theory of construction" of the Income Tax Act of 1913 "which * * * means that millions of dollars have been
78 assessed as income taxes and collected unlawfully," while "immense amounts of income would have entirely escaped taxation" under it.

The theory said to have been adopted is—

"that only two classes of income are taxable, viz: (*a*) individual incomes to which ascertained individuals are absolutely and unconditionally entitled; and (*b*) the incomes of some forms of organization or associations, corporate or not."

Various supposed kinds of trusts are suggested, the incomes whereof, according to the petitioners, would be excluded under the Act from taxability, by the above theory. We might, in many of these instances, agree with the petitioners that in the supposed case no "association" theory could be adopted; but this would depend upon all the facts as shown in each case.

We pointed out in our opinion what seemed to us the broad distinction made in the Act,—i. e., between incomes arising or accruing to individuals, and incomes arising or accruing to groups or bodies of individuals. We have also said, with regard to the in-

come shown to have been received by the petitioners under the circumstances of this case, that, not being claimed to have arisen or accrued to them as individuals, unless it was either taxable under Sec. II, G-*a*, of the Act, or was taxable as income arising or accruing to the individual beneficiaries of their trust, it would be "income upon which no tax was imposed by any express and distinct provisions of the statute." We are unable to believe that this necessarily means an adoption of the theory asserted in the petition.

It may be assumed to be contrary to the general intent of the act, that any income not expressly exempted by it should escape taxation. Nothing in our opinion necessarily requires the conclusion that no given income could, under any circumstances, be held taxable under the Act, unless brought directly within some express and distinct provision therein found. Further than to hold the income here in question not to have arisen or accrued to the beneficiaries of the petitioners' trust as individuals, we have not undertaken to determine or limit the meaning capable of being given to the term "individuals."

79-80 The greater part of what is urged in the petition relates to various Treasury regulations and rulings by the Treasury Department, made and enforced under the authority of the Act, and therefore claimed to manifest its intent. To none of these was any reference made in the petitioners' brief submitted at the argument. We find nothing in them necessarily at variance with what has been determined by our decision.

No judge concurring in the judgment entered desiring a rehearing, the petition must be denied.

81 On January 15, A. D. 1918, these cases came on to be heard together, and were fully heard by the court, Honorable Frederic Dodge and Honorable Charles F. Johnson, Circuit Judges, and Honorable Edgar Aldrich, District Judge, sitting.

Thereafter, to wit, on May 3, 1918, the Opinion of the Court (page 53) was announced, and the following Judgments were entered:

United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1323.

ALVAH CROCKER et al., Trustees, Plaintiffs, Plaintiffs in Error,

v.

JOHN F. MALLEY, Collector, Defendant, Defendant in Error.

Judgment.

May 3, 1918.

This case came on to be heard January 15, 1918, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, May 3, 1918, here ordered, adjudged and decreed as follows: The writ of error is dismissed, and the defendant in error recovers his costs of appeal.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1324.

JOHN F. MALLEY, Collector, Defendant, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

Judgment.

May 3, 1918.

This case came on to be heard January 15, 1918, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

82 Upon consideration whereof, It is now, to wit, May 3, 1918, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed, and the case is remanded to that court, with directions to enter judgment for the defendant; and the plaintiff in error recovers his costs of appeal.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on May 10, 1918, a Petition for Rehearing (page 65) was filed by Alvah Crocker et al., Trustees, and on June 10, 1918, a Rescript (page 77) was filed and the following Order entered:

Order of Court.

June 10, 1918.

No judge concurring in the judgment entered desiring a rehearing, the petition for rehearing filed May 10, 1918, is denied.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on July 5, 1918, the following Mandates issued:

Mandate.

July 5, 1918.

UNITED STATES OF AMERICA, *ss:*

[L. S.]

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Whereas, lately in the District Court of the United States for the District of Massachusetts, before you, in a cause numbered and entitled, No. 823, Law Docket, Alvah Crocker et al., Trustees, Plaintiffs, v. John F. Malley, Collector, Defendant, the following Judgment was entered October 24, 1917:

83 *Judgment.*

October 24, 1917.

BINGHAM, *J.:*

Judgment upon the finding of court for the plaintiff in the sum of $9,554.07 damages, $114.81 interest, from October 11, 1916, and $— costs, pursuant to agreement.

JOHN E. GILMAN, JR.,
Deputy Clerk.

as by the inspection of the transcript of the record in said cause of the said District Court, which was brought into the United States Circuit Court of Appeals for the First Circuit, by virtue of writ of error sued out by said Alvah Crocker et al., Trustees, agreeably to the act of Congress in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and seventeen, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record and was argued by counsel:

On consideration whereof, It is now, to wit, May 3, 1918, here ordered, adjudged and decreed as follows: The writ of error is dismissed, and the defendant in error recovers his costs of appeal.

Costs in this United States Circuit Court of Appeals for the First Circuit for which execution is to issue from said District Court in favor of said John F. Malley, Collector, Defendant, Defendant in Error, and against said Alvah Crocker et al., Trustees, Plaintiffs, Plaintiffs in Error, are taxed at twenty dollars ($20).

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the aforesaid judgment of this court, as according to right and justice,

and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the fifth day of July, in the year of our Lord one thousand nine hundred and eighteen.

ARTHUR I. CHARRON,
Clerk of the United States Circuit Court of Appeals for the First Circuit.

84 *Costs of Defendant in Error.*

Attorney	$20.00
	$20.00

[On the back is the following:] No. 1323. United States Circuit Court of Appeals for the First Circuit, October Term, 1917. Alvah Crocker et al., Trustees, Plaintiffs, Plaintiffs in Error, v. John F. Malley, Collector, Defendant, Defendant in Error. Mandate. July 5, 1918.

Mandate.

July 5, 1918.

UNITED STATES OF AMERICA, *ss:*

[L. S.]

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Whereas, lately in the District Court of the United States for the District of Massachusetts, before you, in a cause numbered and entitled, No. 823, Law Docket, Alvah Crocker et al., Trustees, Plaintiffs, v. John F. Malley, Collector, Defendant, the following Judgment was entered October 24, 1917:

Judgment.

October 24, 1917.

BINGHAM, *J.:*

Judgment upon the finding of court for the plaintiff in the sum of $9,554.07 damages, $114.81 interest from October 11, 1916, and $— costs, pursuant to agreement.

JOHN E. GILMAN, JR.,
Deputy Clerk.

as by the inspection of the transcript of the record in said cause of the said District Court, which was brought into the United

85 States Circuit Court of Appeals for the First Circuit, by virtue of writ of error sued out by said John F. Malley, Collector, agreeably to the act of Congress in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and seventeen, the said cause came on to be heard before the said Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, It is now, to wit, May 3, 1918, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed, and the case is remanded to that court with directions to enter judgment for the defendant; and the plaintiff in error recovers his costs of appeal.

Costs in this United States Circuit Court of Appeals for the First Circuit for which execution is to issue from said District Court in favor of said John F. Malley, Collector, Defendant, Plaintiff in Error, and against said Alvah Crocker et al., Trustees, Plaintiffs, Defendants in Error, are taxed at sixty dollars and sixty-eight cents ($60.68).

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the aforesaid judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the fifth day of July, in the year of our Lord one thousand nine hundred and eighteen.

ARTHUR I. CHARRON,
Clerk of the United States Circuit Court of Appeals for the First Circuit.

Costs of Plaintiff in Error.

Clerk	$32.90
Printing record	7.78
Attorney	20.00
	$60.68

86 [On the back is the following:] United States Circuit Court of Appeals for the First Circuit. No. 1324. John F. Malley, Collector, v. Alvah Crocker et al., Trustees.

Bill of Costs.

Clerk's fees:

Docketing case	$5.00
Filing 24 printed copies of record (½ to 1323)	3.00
Appearances, 3 @ .25 .75; filing .50	1.25
Order of June 8 .20; filing .25	.45
Fling brief	5.00
Filing receipt for brief	.25
Hearing	.20
Transfer to calendars Jan. and April, 1918	2.00
Judgment $1; filing .25; recording .20	1.45
Copy opinion to file $5; filing .25	5.25
Filing petition for rehearing	.25
Order denying rehearing .20; filing .25	.45
Copy rescript to file $1; filing .25	1.25
Order for mandate	.20
Filing bill of costs	.25
Mandate $5; copy to file $1; filing .25	6.25
Copy bill of costs for mandate	.20
Minuting issuing of mandate	.20
Clerk's fees including mandate	32.90
Printing (½ charged to 1323) $6.53; clerk's fees 1.25	7.78
Attorney docket fee	20.00
	$60.68

No. 1324.

United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

JOHN F. MALLEY, Collector, Defendant, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

Mandate.

July 5, 1918.

Thereafter, to wit, on July 23, 1918, the following Motion was filed:

87 *Motion of Alvah Crocker et al., Trustees.*

Original Plaintiffs and Plaintiffs in Error in No. 1323 and Defendants in Error in No. 1324, for Recall of Mandate.

[Filed July 23, 1918.]

Come now Alvah Crocker et al., Trustees, original plaintiffs, and move that the mandates of the Honorable Circuit Court of Appeals in both said cases may be recalled by the proper order of the court to enable said plaintiffs to bring their petition for writ of certiorari in the Supreme Court of the United States.

By their Attorney,

FELIX RACKEMANN.

July 22, 1918.

[Endorsed:] I do not oppose this motion. Thomas J. Boynton, U. S. Attorney, by Francis E. Goodale, Special Assistant U. S. Attorney.

J. J. M., Jr.

On the same day, to wit, July 23, 1918, the following Order of Court was entered:

Order of Court.

July 23, 1918.

It is ordered that the mandates issued herein July 9, 1918, to the District Court of the United States for the District of Massachusetts be, and the same hereby are, recalled until otherwise ordered.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 87, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including July 26, 1918, in the cases in said court, numbered and entitled.

88 No. 1323.

ALVAH CROCKER et al., Trustees, Plaintiffs, Plaintiffs in Error,

v.

JOHN F. MALLEY, Collector, Defendant, Defendant in Error.

No. 1324.

JOHN F. MALLEY, Collector, Defendant, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-sixth day of July, A. D. 1918.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

89 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which Alvah Crocker et al., Trustees, are plaintiffs in error, and John F. Malley, Collector, is defendant in error and John F. Malley, Collector, is plaintiff in error, and Alvah Crocker et al., Trustees, are defendants in error, Nos. 1323 and 1324, which suit was removed into the said Circuit Court of Appeals by virtue of writs of error to the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to
90 the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventh day of November, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States No. 649 of October Term, 1918, wherein this writ of certiorari issued, "that the certified transcript of record on file in the office of the Clerk of the Supreme Court of the United States in the matter of Alvah Crocker, et al., Trustees, Petitioners for a writ of certiorari, against John F. Malley, Collector, Respondent, and there numbered No. 649 of the October Term, 1918, upon the docket of said court, may be taken as a return by this court to the writ of certiorari issued by the Supreme Court of the United States in the said case."

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this twenty-third day of November, A. D. 1918.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

91 United States Circuit Court of Appeals for the First Circuit.

No. 1323.

ALVAH CROCKER et al., Trustees, Petitioners,

v.

JOHN F. MALLEY, Collector, Respondent.

No. 1324.

JOHN F. MALLEY, Collector, Respondent,

v.

ALVAH CROCKER et al., Trustees, Petitioners.

Stipulation.

(Filed November 23, 1918.)

In the above entitled cases, it is hereby stipulated that the certified transcript of record on file in the office of the Clerk of the Supreme Court of the United States in the matter of Alvah Crocker et al., Trustees, Petitioners for a writ of certiorari, against John F. Malley, Collector, Respondent, and there numbered No. 649 of the October Term

1918, upon the docket of said Court, may be taken as a return by this Court to the writ of certiorari issued by the Supreme Court of the United States in said case.

FELIX RACKEMANN,
DUNBAR & RACKEMANN,
Attorneys for Alvah Crocker et al.
JNO. W. DAVIS,
Solicitor General.

H.
THOMAS J. BOYNTON,
United States Attorney,
By FRANCIS G. GOODALE,
Sp. Assistant U. S. Attorney,
for John F. Malley, Collector.

A true copy.
Attest:

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

92 [Endorsed:] File No. 26735. Supreme Court of the United States, No. 649, October Term, 1918. Alvah Crocker et al., Trustees, vs. John F. Malley, Collector of Internal Revenue. Writ of Certiorari.

93 [Endorsed:] File No. 26735. Supreme Court U. S., October Term, 1918. Term No. 649. Alvah Crocker et al., Trustees, Petitioners, vs. John F. Malley, Collector of Internal Revenue. Writ of certiorari and return. Filed November 25, 1918.

Supreme Court of the United States

OCTOBER Term, 1919

649

ALVAH CROCKER, *et al*, *Trustees*, *Petitioners*,

vs.

JOHN F. MALLEY, *Collector*, *Respondent*.

John F. MALLEY, Collector, Respondent,

vs.

ALVAH CROCKER, *et al*, *Trustees*, *Petitioners*.

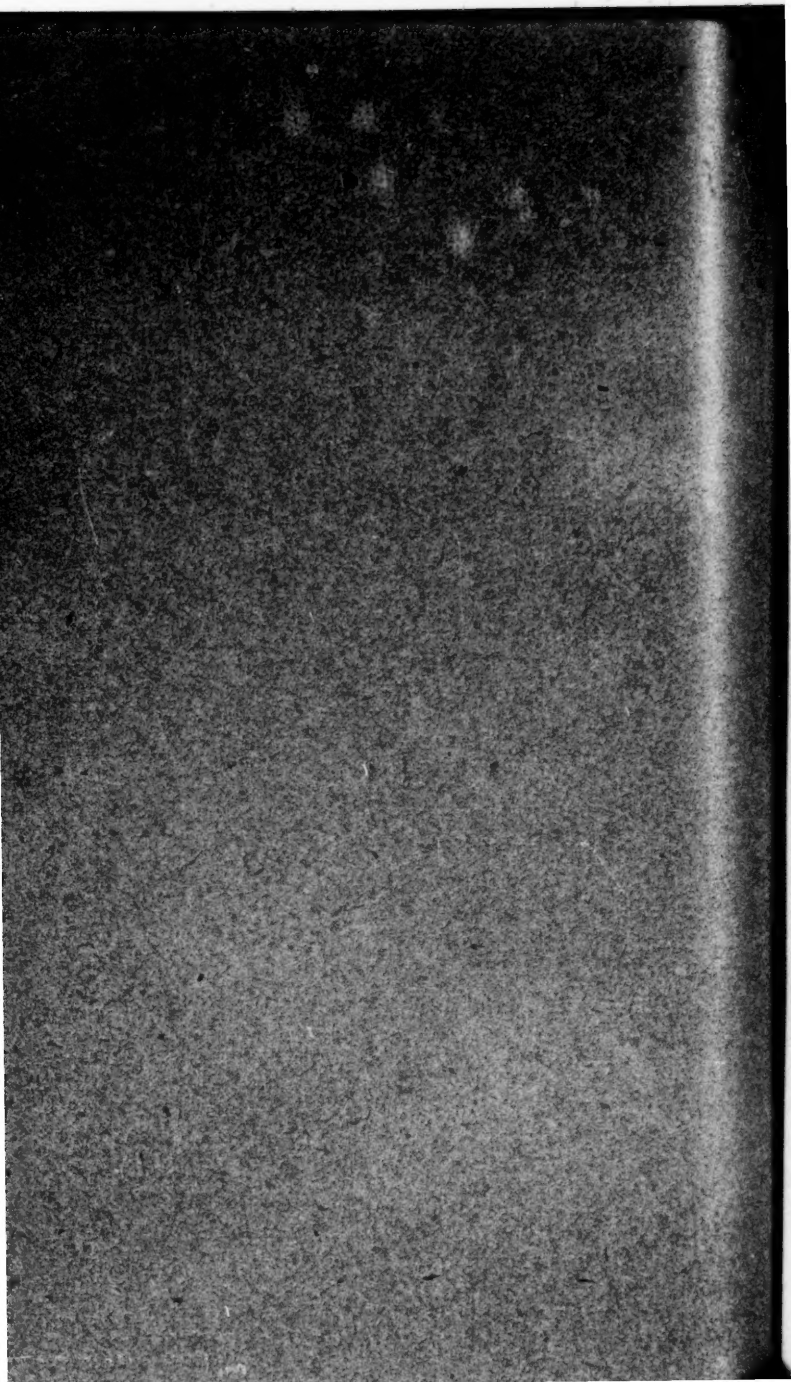
PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

AND APPENDIX

FELIX RACKEMANN,
For Petitioners.

BOSTON:
GEO. E. CROSBY CO., PRINTERS.
204 Atlantic Avenue.
1919



Supreme Court of the United States

OCTOBER TERM, 1917

No. 1323

ALVAH CROCKER, et al, *Trustees, Petitioners,*

vs.

JOHN F. MALLEY, *Collector, Respondent.*

No. 1324

JOHN F. MALLEY, *Collector, Respondent,*

vs.

ALVAH CROCKER, et al, *Trustees, Petitioners.*

PETITION FOR WRIT OF CERTIORARI to the UNITED STATES CIRCUIT COURT of APPEALS for the FIRST CIRCUIT.

and appendix.

To the Supreme Court of the United States:

Your Petitioners, Alvah Crocker *et al*, Trustees, respectfully pray for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit in the above entitled causes.

The Record and General Question.

These are cross Writs of Error arising from a suit of Alvah Crocker *et al* Trustees, of the "Wachusett Realty Trust" so called, against John F. Malley, Collector of Internal Revenue for the District of Massachusetts, to recover back $10,875.40 of Federal income taxes assessed under Act of October 3, 1913, (38 Stats. 166-172), to the plaintiffs as an "association" (or joint stock association) under Section II, Sub-division G (*a*).

Plaintiffs contended that they were strict trustees, not an association, and were taxable as fiduciaries under Sub-division D; the material difference being that assessed as an association stock dividends are included, while assessed as fiduciaries dividends are excluded. The case was tried without a jury on agreed facts, by the Hon. George H. Bingham, Circuit Judge, who determined that the plaintiffs were entitled to recover the total claim, viz: $10,875.40, less the sum of $1321.33, for which sum he found the plaintiffs might have been assessed as fiduciaries. Judgment was entered for the plaintiffs in the sum of $9,554.07, with interest from October 11, 1916.

Both parties sued out Writs of Error from this judgment to the United States Circuit Court of Appeals for the First Circuit; the Collector for the review of the entire judgment, the plaintiffs for the review of the disallowance of the $1321.33.

The Circuit Court of Appeals (Hon. Frederic Dodge, Hon. Edgar Aldrich, and Hon. Charles F. Johnson) ordered that the judgment of the District Court be reversed and the case remanded to that Court with directions to enter judgment for the Collector. (See Opinion Record page 53.)

A Petition for Rehearing was denied by said Court on the 10th day of June, 1918. (Record page 77.)

The mandates in these cases have been recalled. (Record page 87.)

The question we present in this Petition is no mere private litigation but one involving the proper construction of important words in the Federal Income Tax law.

No conflict of testimony, no dispute over facts, is presented. The Revenue Department adopted, on its own motion, and followed for over two years, the construction we insist on, and then reversed itself. The District Court held with us. The Court of Appeals reversed the decision of the District Court, and necessarily the construction and practice adopted by the Revenue Department for over two years. The question is of wide application, involves very large amounts in every part of the country, and, is of public importance.

The Agreed Facts.

The agreed facts (record page 15) show (so far as material here) substantially the following summarized situation:

Many years ago Crocker, Burbank & Co. did business at Fitchburg, Mass., as a partnership, manufacturing paper. Later they incorporated in Maine, and so continued for many years. In 1912 they reincorporated in Massachusetts, the stockholders being eight members of the families.

On reincorporation the Massachusetts Company took title to most of the property and a long term lease of the rest.

It was desired that the Maine Company might be liquidated and dissolved. Pending development of further plans, title to the leased premises and the shares of the new Company were taken by the petitioners, as trustees, under a Declaration of Trust which they then made, and which appears (record page 10) called "The Wachusett Realty Trust."

A full copy of this Declaration is in the Appendix A at the end hereof. (post p. 14.)

This arrangement was assented to by each shareholder of the Maine corporation *merely* by the surrender of the old Maine Company shares, and the acceptance of trust receipts issued by these trustees.

The new Massachusetts corporation thus acquired seven of the mills in fee, and lease of the eighth mill and outlying properties.

The shareholders of the Maine corporation took the trust receipts of the trustees in exchange for their shares of the Maine Company, and the Maine Company was dissolved.

The trustees have done no business. They have received from time to time rental from the Massachusetts corporation, and the dividends declared on the stock of that corporation, and have disbursed such income, less charges and expenses, to their several beneficiaries. There is no joint stock, no "capital" as such. There is no liability of the *cestui que trusts* for anything. The trust is stated to be for the purpose of conversion into money and liquidation.

The Petitioners and Their Trust.

The Petitioners are trustees under a Declaration of Trust made by them dated March 29, 1912, a copy of which appears as Appendix A. (post page 14) (Record page 10.)

That Declaration created a strict trust at Common Law with the eight beneficiaries, strict *cestui que trusts*. There is no question about this.

Hale, District Judge, so held in Crocker *v.* Crocker (not reported.) (Record page 42 and page 62.)

Bingham J so held at the trial (Record page 42) and the Circuit Court of Appeals agrees (Record page 62.)

A full copy of the memorandum decision of Hale J. is added hereto as Appendix D. (post p. 24)

In Crocker *v.* Crocker this very Declaration of Trust, was before the District Court in 1914 on a Bill in Equity, brought on the authority of Eliot *v.* Freeman, 220 U. S. 178, for an

injunction restraining the trustees from making return under the Income Tax Law of 1913 as an association.*

Income taxes were assessed to these trustees for the years 1913 and 1914 *as fiduciaries*, and duly paid by them.

Thereafter the Collector demanded additional taxes for these years, and new taxes for 1915, on the theory that the plaintiffs were an "association"; the practical difference being that, as fiduciaries, they were not taxable in respect of their stock dividends, while if an "association" or *quasi-corporation* they were liable for such dividends.

This suit is to recover back such additional taxes.

At the trial the Collector claimed that the plaintiffs would have been assessable and liable in 1915 as fiduciaries for a tax of $1321.33, and that, therefore, the plaintiffs could not recover their full claim by that amount in any event.

To this the plaintiffs objected that this was not a suit against the Government, and that the Collector had no right, in this suit, to set off amounts which might be due on other accounts from the plaintiffs *to the United States Government*, as if the United States were the real defendant, and that such set off in this suit would be no protection to the plaintiffs against a later claim by the Government.

The Decision of the Court of Appeals.

The Court of Appeals decides that the Act taxes two classes of income only; viz—(*a*) *individual* income and (*b*) *group* income (Record page 78). It then decides that the income of the *cestui que trusts* is not *individual* income, "arising or accruing to them" as individuals, because the trustees, *though, in fact, they distributed the entire net income* (Record page 18 top) had the right to make reserves therefrom. (Record page 60) and

*NOTE—It was hoped that (following the precedent of Eliot *v.* Freeman) that case of Crocker *v.* Crocker might have gone to the Supreme Court of the United States, so that the question could have been there finally decided, but the Department of Justice did not favor such course at that time, and the suit went no further.

that the income was not "immediately available to the beneficiaries." (Record pages 59-60.)

It then decides that unless the income be considered *group income* it is not taxable under any "*express provisions*" of the Act; and therefore, despite its conclusion that the trust in question is a "strict trust," and the beneficiaries strict "*cestui que trusts*" (Record page 62) it decides, on a forced and unnatural construction of the words "Joint Stock Association," that either the trustees and their *cestui que trusts* or the *cestui que trusts* separately, or the "trustees collectively" (it is very doubtful which) formed such an "Association" and were taxable as such (see Opinion Record top page 63, and near bottom same page, and page 64, 7th line.)

The intent of the Court of Appeals is obscure in respect of the persons held to constitute the "Association."

First the Court says the "Association" is of the *trustees* and the *cestui que trusts*. (Record foot page 62 and top page 63). Then it says the *cestui que trusts* alone were associated (Record foot page 63), and finally that the income was received by the *trustees collectively* (Record page 64.) Would the decision have been different if there had been one trustee instead of five?

The Errors of the Decision.

We may assume, for the argument, with the Court of Appeals, that the Act taxes, generally, two classes only of income, viz,—*individual* income and income of corporations, joint stock companies etc., generally referred to by the Court as "group" income. It is not true that income of a strict trust actually paid to a beneficiary is not his *individual* income because his trustees had some discretion as to distributing or holding or applying it. All the net income was, *in fact*, distributed by the trustees. (Record page 18.)

It is here that the Court of Appeals made its real error and in consequence, in order to bring the assessment under some

"express provision" of the Act, obliged itself to resort to its forced construction of the words "Joint Stock Association."

It is error to say in the same breath that certain individuals are "*cestui que trusts*" under a strict common law trust, (See Opinion Record page 62) but that at the same time they, either by themselves or together with the trustees, form a "joint stock association" under the Act of 1913.

Such a decision throws all legal classification into doubt and tends to great confusion of legal principles.

It is perfectly clear that, whatever classes of income be taxable, there are *three* classes upon whom the taxes shall be levied and assessed, viz., individuals, fiduciaries, and corporations or quasi corporations.

The material parts of the Act are, for convenience, stated in Appendix B.—(post p. 19).

The income of an individual *cestui que trust* is collected by his trustee who has to make return thereof and pay the tax thereon.

The act requires such returns and payments from fiduciaries as to all income collected by them whether absolutely and immediately payable by them to some named beneficiary or not.

There is no resulting confusion whatever if *individual income* be held (as the Treasury Department rules) to include, not only all income actually paid over by a trustee to his *cestui que trust*, but all income "arising or accruing" to individuals "whether distributed or not."

I.

The Federal Income Tax Act of 1913, Sec. II G *(a)* applies to "every corporation, joint stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships."

The Circuit Court of Appeals holds that under this section five trustees of a strict common law trust are assessable as a "joint stock association."

We submit that this is error.

The Court of Appeals erred, *first*, in its determination as to what is *individual income*, and *second*, in its adoption of so novel and unprecedented a meaning of the words "Joint Stock Association."

II.

In the administration of the Federal system of income taxes and war revenue taxes, it is important that the words "joint stock company or association," as used in the Act of October 3, 1913, and repeated in the subsequent acts (Act of Sept. 8, 1916 and Act of Oct. 3, 1917), should be defined.

There is need of a judicial construction of the scope of the words "joint stock company or association" as used in the Act of Oct. 3, 1913 and subsequent acts, as compared with the same words in the Corporation Tax Law of 1909, which was before this Court in Eliot *v.* Freeman, 220 U. S. 178.

In Eliot *v.* Freeman, this Court construed the words "organized under the laws of the United States or of any State" etc. as limiting the operation of the Corporation Tax Law to corporations and to joint-stock companies or associations organized under statute.

It is submitted that the words "joint-stock" in the Act of 1913 govern the word "association" just as much as the word "company", and that the intent of Sub-section G (*a*) was to group only corporate and *quasi-corporate* organizations.

Would this statute have called for a different construction if the clause had read "joint-stock association or company," instead of "joint-stock company or association"?

"Joint-stock associations" have been known to the common law since the time of Queen Ann, and the term "joint-stock association" is, in the history of the development, more frequent than the term "joint-stock company." The former is the expression used by this Court in Eliot *v.* Freeman, 220 U. S. at page 186.

For the English construction of the word "association" see the leading case of Smith *v.* Anderson, 50 L. J. Ch. 522. See also the later case of *in re* Thomas *ex parte* Poppleton, 54 L. J. QB. 336.

The decision of the Circuit Court of Appeals is contrary to these English cases.

III.

The opinion of the Circuit Court of Appeals lays down in unqualified terms the proposition, (clearly unsound, as we submit), that the income received by the Trustees of the Wachusett Realty Trust, could not possibly be deemed income accruing, through the hands of the Trustees, to the beneficiaries

individually, in spite of the fact that it was actually distributed among them; the only reason given being that under the provisions of the Declaration of Trust, the Trustees had the power in their discretion, to withhold income from distribution and apply it to the development and improvement of the trust property; it could not, therefore, the Court holds, be income taxable to the Trustees, as fiduciaries, under Section II, D of the Income Tax Act. (Record page 61-62.)

This conclusion, and the reason given therefor, the Court appears to regard as beyond question, and it is on this assumption that the Court seeks some other provision of the statute, under which the income might be taxed. In this way the Court was led to adopt a strained and unnatural meaning of the word "association". For the Court says, in substance, "It is impossible to consider this income as individual income of the beneficiaries, to be taxed to their trustees, through whom they received it, and unless we can find a way to bring it under the clause taxing the income of corporations and similar 'group income', it will escape taxation under any express provision of the Statute."

This proposition is contrary to the practise of the Treasury Department.

It is not sound as a construction of the statute, and if the error is not corrected, it will cause great doubt and confusion in the administration of the law, under the later statutes as well as under the Act of 1913.

IV.

It is submitted (notwithstanding the Rescript of the Court of Appeals, Record page 77) that the opinion, holding that trust income cannot be taxed as income of the *cestui que trust* unless it be "immediately available" as such to him,—and if

not so available to a *cestui que trust* still cannot be taxed as the income of the trustee, does create grave doubt as to the taxation (and even taxability) of the income from some or all of the following.

(*a*) funds held in trust for accumulation,

(*b*) funds under all spendthrift trusts,

(*c*) funds held in strict trust for the maintenance of various objects, charitable or otherwise,

(*d*) all family trusts under wills, as settlements for the "support" of widows, or the "education and support" of children, and

(*e*) all estates in process of settlement, including not only estates of deceased persons, but estates administered under assignments for the benefit of creditors, and in bankruptcy, and held by receivers because in none of these cases could it be held that the income had become "immediately available" to the beneficiaries, nor could it be held that there was any "association".

The classification of the Act and Regulations is reasonably clear and is comprehensive. The opinion of the Circuit Court of Appeals leaves the law, all over the country, unfortunately vague and doubtful of application.

The Provisions of the Act.

For the convenience of the Court there are set out in Appendix B hereto (post page 19) certain quoted excerpts (so far as material here) from the Act of October 3, 1913 (38 Stats. 166-172) in which we have emphasized by heavier type the particular words important in this connection.

It is submitted that (whatever be the true classification of incomes made "expressly" taxable) the clear intent of these

provisions of the Act was to require returns from and the payment of income taxes by—

(*a*) Individual citizens (Section II, A, Subdivision 1)

(*b*) Fiduciaries of all kinds, (Section II, D.) and

(*c*) Corporations and *quasi-corporations* (Section II, G (*a*))

The Treasury Regulations.

For the convenience of the Court certain of these Regulations are set forth in Appendix C hereto (post page 22.)

Reference to these Regulations shows that the Treasury Department considered Trustees taxable as *fiduciaries* even though the income collected by them as Trustees might be wholly *un*distributed.

It is submitted that these are questions of "gravity and importance" akin to and as important as the questions which this Court did review upon certiorari in the cases of—

Doyle, Collector, etc., *v.* Mitchell Brothers Company. and,—

Hays, Collector, *v.* Gauley Mountain Coal Company and other cases of a group decided in May, 1918, and reported in U. S. Supreme Court Advance Opinions No. 14, pages 521 et seq.

If, as the Opinion of the Circuit Court of Appeals would seem to indicate, all persons who may be *associated* in any general colloquial sense are to be, or may be, held quasi-corporate bodies and taxed as such, the consequent doubts and confusion can be clearly seen.

A certified copy of the record in the Circuit Court of Appeals is presented herewith, hereby referred to, and made part of this petition.

It is respectfully submitted that the writ should issue as prayed.

FELIX RACKEMANN,
Attorney for the Plaintiffs.

August 1918.

APPENDIX A.

THE WACHUSETT REALTY TRUST.
DECLARATION.

KNOW ALL MEN BY THESE PRESENTS That we, Alvah Crocker and Charles T. Crocker both of Fitchburg in the Commonwealth of Massachusetts, John J. Riker of the City and State of New York, Samuel E. M. Crocker of said Fitchburg, and Felix Rackemann of Milton in said Commonwealth, the grantees named in a certain deed from the Crocker, Burbank & Co., Inc., (Maine Corporation), dated this day by which deed there are conveyed to us certain lands and buildings situate in the City of Fitchburg in the Commonwealth of Massachusetts, hereby declare and agree that we will, and our heirs and successors shall, hold said granted premises, and all other funds and property at any time transferred to and received by the Trustees hereunder, for the purposes, with the powers, and subject to the provisions hereof, for the benefit of the *cestui que trusts* (who shall be trust beneficiaries only, without partnership, associate or any other relation whatever *inter sese*), and upon the trusts following, viz:

1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion and distribution, except that the same shall not be postponed beyond the end of twenty years from and after the death of the last survivor of the persons named and described in the last paragraph hereof. During such postponement, and until such conversion, the interests of the *cestui que trusts* shall be considered for purposes of transmission and otherwise as personal property.

2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having, for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have if they were themselves the sole and absolute beneficial owners thereof in fee simple.

3. In trust to collect and receive all rents and income from the property, and semi-annually or oftener at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income, to and among the several *cestui que trusts* according to their respective fractional interests, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development of the property held hereunder, or the acquisition of other property as the Trustees may determine to be wise and expedient, for the protection and development of the trust property as a whole pending its conversion and distribution. The determinations of the Trustees, made in good faith, as to all questions as between "capital" and "income" shall be final.

4. The said Crocker, Burbank & Co. Inc., (Maine Company) having determined to wind up its affairs and be dissolved, without waiting for final cash sale of its real estate, this trust is declared in favor, and for the benefit of the eight shareholders of said Maine corporation, according to their respective fractional interests, to whom the Trustees shall issue proper receipt certificates, which certificates, and all others which may be hereafter issued in exchange or substitution therefor, shall be deemed parts hereof and conclusively evidence the ownership of respective interests in this trust; and the Trustees shall, from time to time, on request, (on surrender of the old) issue such new certificates as may be proper and necessary to evidence any new or sub-divided interests.

5. The Trustees shall have authority to borrow money and fix the terms of any loans, and give any pledge, mortgage or other security which they may deem wise.

No purchaser from or lender to the Trustees shall ever have any liability to see to the application of any proceeds.

6. The Trustees may employ all such agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors or omissions of such agents or attorneys employed and retained with reasonable care.

7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustees serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability except for the results of his own gross negligence or bad faith.

8. The recording of this instrument shall be at such times and in such places as the Trustees may in their discretion, determine to be necessary or expedient, and they shall in like manner determine the form and record of all muniments of title.

9. The Trustees shall have full power at any time, pending final termination of this trust, to transfer the whole or any part of the property then held by them hereunder to any corporation which they may acquire or cause to be organized for the more convenient or expedient holding or management of the property, taking any securities issued by such corporation in exchange and payment therefor, and the Trustees, or any of them, may at any time be or become directors or officers of any corporation any shares of which are held by them.

10. The Trustees shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent reckoned upon the gross income received by them as such, unless, at any time, a majority in interest of the *cestui que trusts*

consent in writing to some larger compensation for any past service. The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses to and from any meetings of the Trustees shall be considered proper expenses.

11. Any Trustee hereunder may resign by written instrument duly acknowledged and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

Any vacancy in the office of the Trustee, however occasioned, shall be filled by the remaining Trustees by an instrument in writing, signed by them and assented to in writing, by the holder or holders of a majority in amount of the beneficial interests herein, such appointment to be in like manner attached to the original of this instrument, or recorded as in the case of resignation last above provided for.

12. If, at any time or times, a majority of the Trustees hereunder shall certify in writing that the remaining Trustees are either absent from the Commonwealth of Massachusetts or incapacitated through illness or otherwise, from acting, then such majority shall, at such time or times, have, and may exercise, any and all the powers of the Trustees hereunder with like effect as if similarly exercised by all.

13. The terms and provisions of this trust may be modified at any time or times by instrument in writing, signed, sealed and acknowledged by the then Trustees, assented to in writing by a majority in interest of the *cestui que trusts*, and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

14. The certificate in writing of the Trustees as to any resignation from the office of Trustee hereunder and as to the appointment of any new trustees hereunder and as to the existence or non-existence of any modifications hereof, may

always be relied upon, and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees in reliance upon such certificate.

15. The title of this trust, (fixed for convenience) shall be "The Wachusett Realty Trust," and the term "Trustees" in this instrument shall be deemed to include the original and all successor trustees.

16. At the end of twenty years from and after the death of the last survivor of said Charles T. Crocker, Samuel E. M. Crocker and Alvah Crocker, and of the lawful issue now living of any of them (unless this trust shall heretofore have been otherwise lawfully terminated), all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled.

IN WITNESS WHEREOF we have hereunto set our hands and common seal on this 29th day of March in the year nineteen hundred and twelve.

ALVAH CROCKER (Seal)
CHARLES T. CROCKER
JOHN J. RIKER
FELIX RACKEMANN
SAMUEL E. M. CROCKER

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss. March 29, 1912.

Then personally appeared the above named Alvah Crocker and acknowledged the foregoing instrument to be his free act and deed,

Before me,

.....

Justice of the Peace.

APPENDIX B.

THE PROVISIONS OF THE ACT.

Section II.

"A. Subdivision 1: That there shall be **levied, assessed,** collected, and paid annually upon the entire **net income arising** or accruing from all sources in the preceding calendar year **to every citizen** of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided;" *****

"Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be **levied, assessed** and collected, upon the net income of every individual and additional income tax (herein referred to as **the additional tax**)" *** All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of Paragraph A, shall apply to the levy, assessment and collection of the additional tax imposed under this section. **Every person** subject to this additional tax shall, for the purpose of its assessment and collection, make a **personal return of his total net income from all sources,** corporate or otherwise, for the preceding calendar year, **under rules and regulations to be prescribed by the Commissioner of Internal Revenue** and approved by the Secretary of the Treasury. For the purpose of this additional tax the **taxable income of any individual** shall embrace the share **to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not,** of all **corporations, joint-stock companies, or associations** however created or organized." ***

(The second paragraph of B provides for certain deductions allowable in the case of individual returns, including, "seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, joint stock company, association, or insurance company which is taxable upon its net income as hereinafter provided.")

"D. ****"On or before the first day of March, nineteen hundred and fourteen, and the first day of March in each year thereafter, a true and accurate **return, under oath** or affirmation, shall be made **by each person** of lawful age, except as hereinafter provided, subject to the tax imposed by this section, and having a net income of $3,000 or over **for the taxable year,** to the collector of internal revenue for the district in which such person resides or has his principal place of business," *** "**in such** form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth" etc. ***"; **guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals (Provided,** That a return made by one of two or more joint guardians, trustees, executors, etc. **** **under such regulations as the Secretary of the Treasury may prescribe,** shall be a sufficient compliance with the requirements of this paragraph; and also all persons, firms, companies, copartnerships, corporations, **joint-stock companies or associations,** and insurance companies, except as hereinafter provided, in whatever capacity acting, having **the control, receipt, disposal,** or payment of fixed or determinable annual or periodical gains, profits, and **income of another person subject to tax, shall in behalf of such person deduct and withhold** from the payment an amount equivalent to the normal income tax upon the same and make and render a return, as aforesaid, but separate and distinct, of the portion of the income of each person from which the normal tax has been thus withheld, and containing" etc. ***

"E. *** All **persons, firms,** copartnerships, companies, corporations, **joint-stock companies or associations,** and insurance companies, in **whatever capacity acting,** including lessees or mortgagors of real or personal property,

trustees acting in any trust capacity, executors, administrators, agents, receivers, conservators, employers, and all officers and employees of the United States **having the control, receipt, custody,** disposal, or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable annual gains, profits, and **income of another person,** exceeding $3,000. for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her, or its district, **are hereby authorized and required** to **deduct and withhold** from such annual gains, profits, and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax."

"G. (*a*) That the **normal tax hereinbefore imposed upon individuals** likewise **shall be levied, assessed, and paid** annually upon the entire net income arising or accruing from all sources during the preceding calendar year to **every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships**)" ***

"(*c*) The tax herein imposed shall be computed upon its entire net income accrued within each preceding calendar year ending December thirty-first:" ***

APPENDIX C.

THE TREASURY RULES AND REGULATIONS

Article 74 of Regulations No. 33, dated January 5, 1914, provided for the tax to **fiduciaries** "having control of any portion of an annual income accruing duing the year," for beneficiaries having a distributive interest, but the income not being distributed or paid over.

T. D. 2231 (superseding original Art. 70 of Regulations No. 33) provided, generally, that guardians, trustees, executors, etc., and all persons acting in any fiduciary capacity, who hold in trust an estate of any other person or persons, shall be designated the "source," "for the purpose of collecting the income tax." It then provided as follows:

> "Fiduciaries shall, on or before March 1 of each year, make and render a return, in form prescribed by the Commissioner of Internal Revenue, of the income coming into their custody or control and management from each trust estate when the annual interest of any beneficiary in the income of said trust estate subject to the normal tax is in excess of $3,000, and also when the undistributed income of the estate (as an entity or beneficiary in and of itself for tax purposes), consisting of income from dividends of corporations and other income (or of dividends alone), shall exceed $20,000. In such cases the estate shall be reported as a beneficiary for the undistributed income."

and also—

> "The income of trust estates, as any other income, is subject to the income tax. When such income is received annually by a beneficiary of an estate the fiduciary will withhold the normal tax due and subject to withholding by him. Any part of the annual income of trust estates not distributed becomes an entity and, as such, is liable for the normal and additional tax, which must be paid by the fiduciary."

T. D. 2231 was amended by T. D. 2289 to read as follows:

> "T. D. 2231 is hereby amended to provide that fiduciaries having control of any portion of income accruing during the year to known beneficiaries other than trust estates, as provided in T. D. 2231, but not distributed or paid to the beneficiaries during the year, shall, in rendering their annual return (Form 1041) give the name and address of each of said beneficiaries having a distributive interest in said income, and shall furnish all the information called for in such returns. In all such cases the fiduciary shall withhold and pay to the Collector, as provided by law, the normal tax of one per cent. upon the distributive interest of each of said beneficiaries, when such interest is in excess of $3,000, the same as if said income were actually distributed and paid to the beneficiaries," etc., etc.

Note, in the foregoing, that the fiduciary is to "withhold and pay." It was in accordance with such Treasury Decisions and Regulations that all such cases have been uniformly taxed for several years.

APPENDIX D.

Opinion of Hale J. in Crocker *v.* Crocker (not reported.)

"Hale, District Judge. In this case the question is presented whether the defendants, Alvah Crocker and others, trustees under a declaration of trust made by them, and called the Wachusett Realty Trust, are taxable under the Act of October 3, 1913, called the Income Tax, as trustees; or should be taxed as agents of an 'association.' On examination of the case, I have no doubt that the defendants are trustees, and that they are taxable under the Act as fiduciaries. There are no elements of an 'association' in the case before me. The leading English authority on the principles involved in this case is Smith *v.* Anderson 50 L. J. Ch. 39; see also Williams *v.* Boston, 215 Mass. 1; Foster *v.* Milton, 215 Mass. 31; Hussey *v.* Arnold, 185 Mass. 202. There is no basis for any claim of partnership relation existing among the trust beneficiaries; they are not *socii*. The case shows there are no mutual rights or obligations. They carry on no business by themselves, or by any agents or representatives; they have not exercised any voice in the management or control of the trust property, or over the defendants, who act strictly as trustees, and have the entire ownership, management and control precisely as though they had been appointed by will to the same position.

"I have no doubt in coming to the above conclusion on the question submitted to me. I have some question, however, as to the decree which should be entered in the case. Upon this I desire to hear counsel."

Supreme Court of the United States.

October Term, 1924.

No. 649.

ALVAH CROCKER ET AL., TRUSTEES,
Petitioners,

vs.

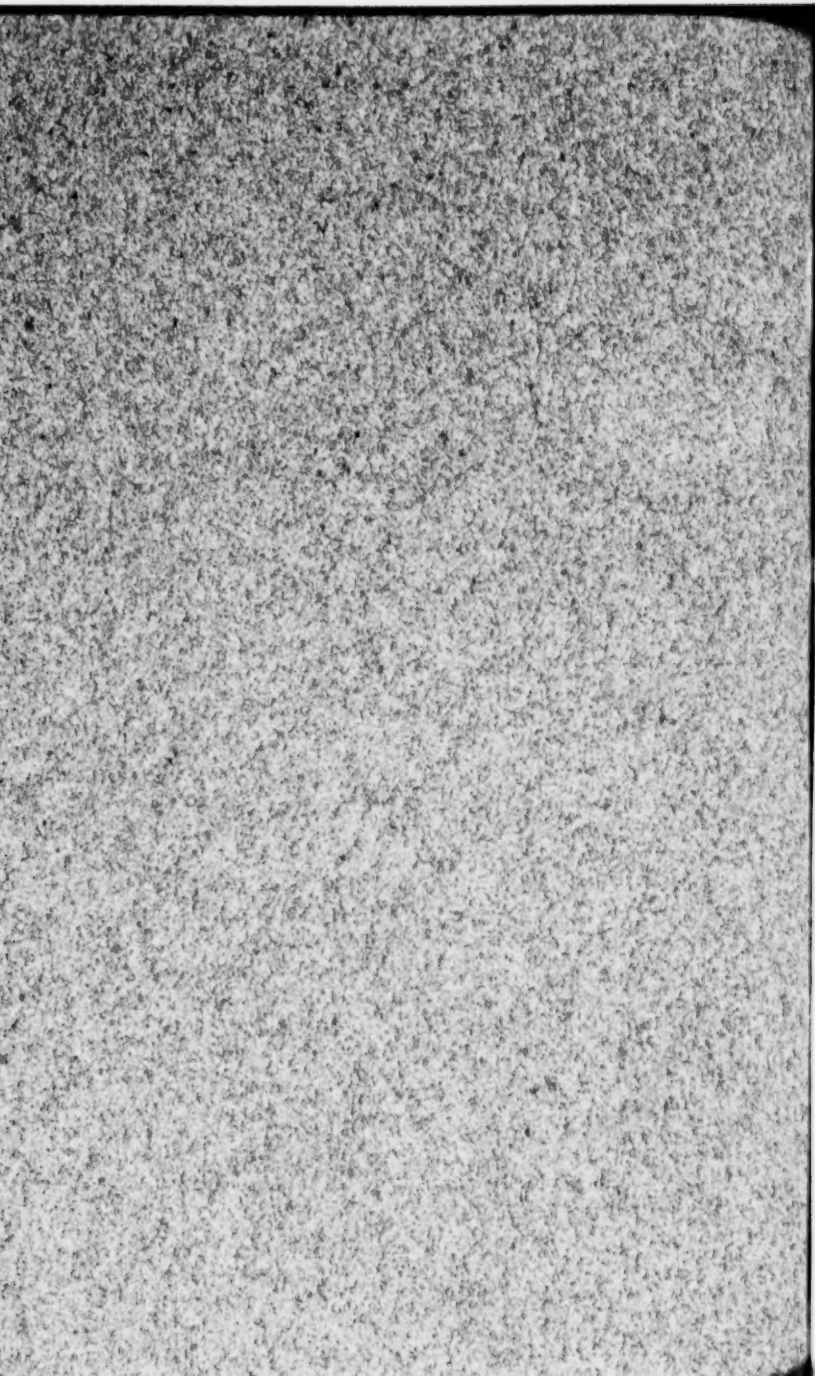
JOHN F. MALLEY, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Petitioners.

FELIX RACKEMANN,
HARRISON M. DAVIS,
Of Counsel for Petitioners.

ALDEN C. STEVENS & SON, BAY STATE PRINTING, BOSTON.



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Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 649.

ALVAH CROCKER ET AL., *Trustees, Petitioners,*

v.

JOHN F. MALLEY, *Collector of Internal Revenue.*

BRIEF FOR THE PETITIONERS.

This case comes to this Court on certiorari to review the action of the Circuit Court of Appeals for the First Circuit, in disposing of cross writs of error arising from a suit of Alvah Crocker *et al.*, Trustees, against John F. Malley, Collector of Internal Revenue for the District of Massachusetts, to recover $10,875.40 of Federal income taxes assessed to the plaintiffs as a "joint stock company or association" under section II, subdivision G (*a*), of the Act of October 3, 1918 (38 Stats. at Large, 166-172).

The plaintiffs in that suit contended that they were strict trustees, required under another section of the statute, sub-division D, to make returns as fiduciaries and to withhold and pay, on income distributed by them to their trust beneficiaries, the normal tax levied by the Act on incomes of individuals.

The District Court gave judgment for the plaintiffs for the amount which they claimed to recover as having been illegally assessed and collected, less the sum of $1321.33, for which sum the Court found that the plaintiffs might lawfully have been assessed for the

year 1915, as fiduciaries, under sub-section D, above referred to.

Both parties sued out writs of error, the Collector to review the entire judgment, the plaintiffs to review that part of the judgment which disallowed the sum of $1321.33.

The plaintiffs' writ of error was dismissed without consideration of the question raised by it, because, on the main question, raised by the Collector's writ of error, the Circuit Court of Appeals decided against the plaintiffs, ordered the judgment of the District Court to be reversed and judgment entered for the defendant.

A petition for rehearing was denied by the Circuit Court of Appeals on June 10, 1918. (Record, p. 57.)

Jury trial was waived and the case was presented and tried in the District Court on the pleadings and agreed facts. (See Record, pages 12 *et seq.*)

The agreed facts (Record, page 13) show substantially the following summarized situation:

The Agreed Facts.

Long years ago Crocker, Burbank & Company did business at Fitchburg, Massachusetts, as a partnership, manufacturing paper. After many years they incorporated their business in Maine and continued for many years under the Maine charter. In 1912 they reincorporated in Massachusetts, the stockholders being a few of the members of the families of the former partners.

The concern had a number of mills on the Nashua River, and, to protect the water from pollution, had

acquired considerable outlying real estate not otherwise pertaining to the business.

On reincorporation in Massachusetts there was transferred by the Maine company to the Massachusetts company fee-simple title to seven of the mill properties.

One other mill then in process of construction, and the outlying parcels of real estate, and some tenements, occupied by employees, were leased by the Maine company to the Massachusetts Company for a long term of years.

It was desired that the Maine company might be liquidated and dissolved. Pending the development of further plans, on the suggestion of Mr. Alvah Crocker, president, the fee-simple title to the leased premises above mentioned was taken into the hands of himself and four associates, as trustees, for liquidation. Pending the liquidation the shares of the Massachusetts corporation taken by the Maine company in payment were also left in the hands of the same trustees.

This arrangement was assented to by each individual shareholder of the Maine corporation *merely* by the surrender of the old Maine company shares, and the acceptance of trust receipts issued by the plaintiffs as trustees under a declaration of trust, which they then made, and which appears as Exhibit A, Record, pages 9 *et seq.*

For convenience a copy of the Trust Declaration is printed as Appendix A at the end hereof. (Page 54.)

The new Massachusetts corporation thus acquired the business and seven of the mills in fee and a lease of the eighth mill (then in process of construction) and of the outlying and tenement properties.

The plaintiffs, as trustees under the declaration, took the title to this eighth mill and the outlying properties, subject to the lease, and also took, as trustees under the same declaration, the shares of the Massachusetts corporation.

The former shareholders of the Maine corporation took the trust receipts of these trustees in exchange for their former shares of the Maine company, and the Maine company was dissolved.

The form of the trust receipt appears. (Record, page 15.) The receipts are without par value, and merely entitle the holders to fractional parts of final "net proceeds," etc.

The trustees have continued to hold the title and shares so conveyed to them subject to the lease. They have received from time to time rental from the Massachusetts corporation, and the dividends as declared on the stock of that corporation, and "have disbursed such income, less charges and disbursements for taxes and similar expenses, to their several beneficiaries in proportion to their respective interests." (Record, foot page 14.)

The trust is stated to be for purpose of conversion into money and distribution. (Art. 1, Declaration of Trust, Record, page 9.)

The Revenue Department, for two years, assessed income taxes to Crocker and associates *as fiduciaries*, but then reversed itself and assessed them as an association, or quasi-corporation. The taxes so re-assessed were paid to the defendant Collector under protest, and this suit is to recover them back.

THE QUESTIONS OF LAW AT BAR.

The Record presents two questions:

1. Are the plaintiffs entitled to recover back the taxes paid? This question is raised by the writ in *Malley, Collector*, v. *Crocker et al.*, No. 1324 in the Circuit Court of Appeals.

2. If the plaintiffs are entitled, did the District Court err in deducting from the plaintiffs' claim for taxes assessed against them *as an association* (for 1915) the sum of $1321.33, and entering judgment for the balance only, on the theory that the plaintiffs might have been assessed *as "fiduciaries"* for $1321.33 under another section of the Act. This question is raised by the writ in *Crocker et al.* v. *Malley*. (C.C.A. No. 1323.)

I.

We take up first the main question:

ARE THE ORIGINAL PLAINTIFFS ENTITLED TO JUDGMENT?

The plaintiffs claim to be strict fiduciaries under the declaration of trust, Exhibit A (Record, page 9), and taxable under the Act of Congress as such fiduciaries. The Collector claims that the plaintiffs, trustees—or their *cestui que trusts*—or both together—form a "joint-stock association" within the meaning of the Act of Congress, and are taxable as such.

It will, therefore, be seen at the outset that the question involved in the case at bar is whether the plaintiffs under their declaration of trust are merely fiduciaries, or an association, or joint-stock association.

The Income Tax Law (Act of Congress of October

3, 1913, 38 Stats. 166) in section II, sub-section D, provides specifically for returns of income of their beneficiaries by, and the taxation thereon of, "guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity."

Sub-section G, paragraph *a*, provides for the taxation of "every corporation, joint-stock company or association and every insurance company organized in the United States, no matter how created or organized, not including partnerships."

Sub-section A provides for the taxation of individuals.

Quotations from these sections are printed in the Appendix. (*Post*, pages 60 *et seq.*)

The Act of Congress, therefore, itself clearly recognizes the distinction between the fiduciary and the association or quasi-corporation; and from the language of the sub-sections last-above quoted ("not including partnerships") it would even seem doubtful if Congress intended that any body should be excluded from this class except the ordinary commercial partnerships.

In many states there are statute provisions for the formation of joint-stock companies or *associations* of various kinds and for various purposes. Military, educational, religious, agricultural, medical, and others are common, and there are also workingmen's and firemen's associations, various forms of protective association, and various forms of charitable organization. The stock exchanges and trade unions are other examples. Many of these have large invested funds and considerable incomes.

In Massachusetts there is no statute provision in respect of any such association as the Collector claims to exist in the case at bar, and the contention of the defendant must, therefore, rest either upon the quasi-partnership theory or some other entirely vague and general construction of the words "joint-stock company or association."

STRICT TRUSTS AND QUASI-PARTNERSHIPS.

First we take up the question as to where the strict trust relation ends and the quasi-partnership (or "association") relation begins.

That there are clear and sharp distinctions in the law between trusts and partnerships goes without saying.

The "partnership" is one growth and development of the law; the "trust" is a separate and entirely different growth and development. The original reasons for these two legal creations were entirely different; the purposes and objects were entirely different; the histories and courses of development have been different; and down to the present day they stand as two entirely independent creatures of the law, each serving its own useful purpose, but having little in common.

In the case of the partnership we find two or more contributors (of some kind of value) to a common fund for a common business purpose, and for joint account, either profit or loss, the contributors having themselves, or through some deputation, the management and control.

In the case of the trust we find one or more persons, with varying forms of beneficial interest in a common property or the income thereof, *but without association inter sese*, and *without voice in the management thereof;* the entire legal title and control, management, and general authority being in the trustee as such.

The two come close together in the case of the quasi-partnership, or so-called "association" of many members, which puts the title to its real estate (and perhaps other property) in a trustee for greater convenience in immediate management and conveyance.

Convenience and business demand have, in modern times, developed this species of *combination* of trust and partnership, where the title is held for beneficiaries, who, beside being trust beneficiaries, are also quasi-partners *inter sese*.

But even in these cases there is no mingling of the legal principles. There is the trust and there is the partnership. They are absolutely distinct. The only novelty is that the "*cestui que trusts*" are also "associates" or "partners" *inter sese;* or perhaps, more strictly, the sole *cestui que trust* is the partnership entity.

It is obvious, however, that all *cestui que trusts* are not partners *inter sese*, and, if they are not, their trustee is not trustee for any partnership.

We must first, therefore, determine when and under what circumstances are trust beneficiaries partners *inter sese*.

It is submitted that the law has, down to the present day, never known any such thing as a partnership in

JAMES, L.J., in his opinion, says, of the various contributors to this trust:

> "I cannot myself find in this any association whatever between the persons who are supposed to be *socii*; . . . they have never come into any arrangement whatever as between themselves. There never has been anything amounting to any mutual rights or obligations as between those persons, . . . Persons who have no mutual rights and obligations do not, according to my view, constitute an association because they happen to have a common interest or an interest severally in something which is to be divided between them."

As to whether or not there was any business carried on by associates, JAMES, L.J., says:

> "The association—that is to say the body of subscribers or the body of certificate holders—do not, as it appears to me, carry on any business. They cannot be said to carry on any business by themselves or by any agent. I am unable to conceive any state of circumstances in which the law would give any right to the body of shareholders as such, or fix any liability upon them as such. I cannot conceive any state of circumstances in which it could be averred that any contract had been made by or on behalf of the body of certificate holders either by any member of themselves, or by any other agent or manager for them."

As to the carrying on of the business, the same opinion says that the business, if any, is carried on by trustees, and that they were trustees and not directors or agents of the certificate holders.

> "To my mind the distinction between a director and a trustee is an essential distinction; it is a distinction which lies in the very nature of things. A trustee is a man who is the owner of the prop-

> erty, who is the principal, who deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestui que trusts*. . . . The office of director is that of a paid servant of the Company. He never enters into a contract for himself, . . . he enters into contracts for his principal and that principal is the company of whom he is a director and for whom he is acting."

The same reasoning in shown in the opinion of BRETT, L.J.

Smith v. *Anderson* has been recognized as the controlling authority since its decision; see Lord COLERIDGE in *Crowther* v. *Thorley*, 50 L.T. 43, in the decision of which BRETT, M.R., affirmed his views as expressed in *Smith* v. *Anderson*, and BOWEN, J., concurred.

See also *In re Siddall*, 54 L.J. Ch. 682.

And in a still later case, *In re Thomas, ex parte Poppleton*, 54 L.J. Q.B. 336, the distinction is again emphasized between the case of beneficiaries having interests in a trust fund and associates having interest in a common fund managed by themselves or their agents, or committee, the Court saying:

> "The committee did not carry on business as trustees like those in *Crowther* v. *Thorley* but carried on business as agents and officers of the society."

The commercial and building society involved in this case was therefore held to be within the Act.

So much for the definitely settled law of Massachusetts and of England.

THE UNITED STATES AUTHORITIES.

In this Court the law is the same, and the case of *Taylor* v. *Davis*, 110 U.S. 330, is helpful, and perhaps conclusive.

In that case, as in the case at bar, there was a declaration of trust. The trustees were thereby given the fullest powers to make contracts, incur obligations, make improvements on the lands, and purchases, and sales, and leases, and donations, and investments "expedient to promote the interests of the shareholders." The trustees did erect levees, made river improvements, built roads, cleared land, built a hotel, laid out a cemetery, ran a steamboat, operated a quarry and a ferry, established a newspaper, platted a city and additions, constructed wharves, etc., and yet the Court held that there was a strict trust, and in the opinion distinguished very clearly the position of trustee from that of agent.

There is, in *In re Associated Trust*, 222 Fed. 1012 (1914), a clear and careful opinion of MORTON, J. (Mass. Dist.), involving exactly the same distinctions and principles as are urged by the plaintiff in this brief.

In that case there was an involuntary petition in bankruptcy against "The Associated Trust." The question was as to the legal character of the so-called trust and whether it might be considered an "unincorporated company." The Court, in deciding that question, referred to the decision in *Williams* v. *Milton*, 215 Mass. 1, and says:

> "The legal character of trusts resembling the respondent has several times arisen in the Massachusetts courts, generally upon question of taxation, and the court has been called upon to decide

whether they were to be taxed as partnerships or as ordinary trusts. In some cases such organizations have been held to be partnerships and in others to be strictly trusts. The distinction between the two turns upon the provisions of the trust agreement or declaration. In cases where, by the declaration of trust, the shareholders are given substantial control of the management of the trust property, the trust is held to be a partnership; in cases where shareholders have no such control the trust is held for the purposes of taxation, to be of the same sort as the usual testamentary trust and not to be a partnership. No middle ground is found in the Massachusetts decisions."

The Court goes on in recital of the character of the "Associated Trust" to say that the declaration covered one million dollars paid in to the trustee, for transferable certificates which should be issued by him entitling the interest and participation in surplus earnings, and after a period of years to receive from the trust the face value upon surrender thereof, the trustee being given broad powers as to the management of the property, with the right to determine what part of the income should be divided and what retained as surplus, the certificate-holders having no power to interfere directly in the management of the property, and having no title to it, and there being a "Board of Directors" who may be appointed by the trustee, and removable by him, their duties being merely advisory. The Court says:

"Up to this point there would seem to be nothing in the organization differentiating it, under the Massachusetts decisions, from what may be called an ordinary trust; that is the beneficiaries, cestuis, or stock holders (whichever they may be called) have no interest in the trust property and no right of joint action for control of it. They are in sub-

stance like beneficiaries in a trust under a will. *There is no organization having a distinct entity apart from the trustee.*"

If no organization no "association," "however organized."

For the reason that the declaration of trust in the case of the "Associated Trust" went further, and provided that the certificate-holders might hold meetings and elect new trustees and fill vacancies, and vote by proxy, and have special meetings, and might, on vote, determine the trust and increase the shares and amend the declaration, the Court held that the certificate-holders had voluntarily united in a business organization with certain rights to be exercised by joint action of all the certificate-holders, and that therefore they did constitute "an unincorporated company."

It is only necessary to call attention to the fact that none of the elements upon which Judge MORTON's decision specifically rests appear in the case of the "Wachusett Realty Trust" declaration under consideration here.

The decision directly supports the contentions here argued.

It may be argued on behalf of the collector that, under the declaration of trust made by the plaintiffs here, vacancies in the board of trustees and amendments of the trust declaration may be made by the trustees "*with the consent* of a majority in interest of the beneficiaries," and that such consent indicates associate action; but that precise question was considered by the Supreme Court of Massachusetts in

Williams v. *Milton*, 215 Mass., at page 10, and as to it the Court said:

> "The only act which [under the trust indenture] they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders or 'cestuis que trustent' can do is to give or withhold their consent to the trustees taking such action, and the giving or withholding of consent by the cestuis que trust is not to be had in a meeting, but is to be given by them individually. As we have said, no meeting of the cestuis que trust for that or any other purpose, is provided for in the trust indenture."

In addition to all the foregoing there is the memorandum opinion (not reported) of HALE, J., sitting in the Massachusetts District and upon the identical declaration of trust here involved.

In 1914 one of the beneficiaries of the so-called "Wachusett Realty Trust," on the authority of *Eliot* v. *Freeman*, 220 U.S. 178, brought a bill in equity in the District Court of Massachusetts against the present plaintiffs for an injunction restraining them from making return under the Income-Tax Law as an association or quasi-corporation.

The case was argued orally, and further presented on written briefs to HALE, J., who, on May 23, 1914, filed a rescript in the cause reading as follows:

> "*Hale, District Judge.* In this case the question is presented whether the defendants, Alvah

Crocker and others, trustees under a declaration of trust made by them, and called the Wachusett Realty Trust, are taxable under the Act of October 3, 1913, called the Income Tax, as trustees; or should be taxed as agents of an 'association.' On examination of the case, I have no doubt that the defendants are trustees, and that they are taxable under the Act as fiduciaries. There are no elements of an 'association' in the case before me. The leading English authority on the principles involved in this case is Smith v. Anderson, 50 L. J. Ch. 39; see also Williams v. Boston, 215 Mass. 1; Foster v. Milton, 215 Mass. 31; Hussey v. Arnold, 185 Mass. 202. There is no basis for any claim of partnership relation existing among the trust beneficiaries; they are not socii. The case shows there are no mutual rights or obligations. They carry on no business by themselves, or by any agents or representatives; they have not exercised any voice in the management or control of the trust property, or over the defendants, who act strictly as trustees, and have the entire ownership, management and control precisely as though they had been appointed by will to the same position.

"I have no doubt in coming to the above conclusion on the question submitted to me. I have some question, however, as to the decree which should be entered in the case. Upon this I desire to hear counsel."

It was hoped that, following the precedent of *Eliot* v. *Freeman*, that former case of *Crocker* v. *Crocker* might have gone to the Supreme Court at Washington, so that the question could finally be decided as against the Government in that case.

The Department of Justice did not favor such course at that time, and *Crocker* v. *Crocker* went no further.

Mr. Justice HALE's rescript remains, however.

The exact question here at bar has, therefore, been

squarely decided by HALE, J., and by BINGHAM, J., who gave the present plaintiffs judgment.

It is, perhaps, significant that for two years the Treasury Department assessed taxes to the plaintiffs on the fiduciary theory here contended for.

It is certainly very significant that the contention of the Collector in the case at bar means double taxation. The trustees in the case at bar hold a large value in shares of Crocker, Burbank & Company, Inc., a Massachusetts corporation. That corporation, of course, makes its regular return to the Federal Government and pays a tax upon its net earnings. Its dividends are received by the trustees, plaintiffs in this suit. If the Collector succeeds in his contention here that the plaintiffs are an association, it means that these same dividends are taxed again, as the earnings of such an association, whereas, if the dividends are received by the plaintiffs *as trustees*, they are distributed by them to their beneficiaries, free from further claim of normal tax, which the corporation has already paid through its payment of the tax upon its net earnings.

It is probably a matter of common knowledge that the Government does not tax the so-called *railroad and other voting trusts* as associations.

It is surely deserving of notice that the declaration of trust made by the plaintiffs in the case at bar provides in the opening paragraph and in paragraph one that the property is held for conversion "for the benefit of the cestui que trusts (who shall be trust beneficiaries only without partnership, associate or any

the management of the affairs of which no one of the partners had any voice whatever, and for the debts of which no partner was individually liable; and it may be fairly stated that in every partnership some one or more of the partners have, directly or indirectly, the management of the partnership property and personal liability for debts. They may manage the property themselves, or through their control of and power to direct their servants or agents or directors; they may similarly manage, through their control and power (if reserved), to direct the trustee holding their title; but in every case of partnership we find, and must find, some managing, directing, and controlling power in the partners, acting individually or by deputation. If there be no such power and control, *there is no partnership and no association.*

In sharp contrast we have (as in the case at bar) the strict trust, in which the beneficiaries or *cestui que trusts* have their common interests and perhaps equitable titles (or perhaps only rights to an account and share of proceeds realized by their trustee), but who have no immediate right or title to the property and who have no voice or authority in connection with its management or disposition, the *entire legal title and authority* being vested in the trustee.

There is no occasion, if historical development and clear lines of principle be borne in mind, for confusion between the two.

If, by will, a testator leaves property in trust to be invested and managed for the benefit of his six children, income payable to the children in equal shares

until the youngest child becomes twenty-one, the property then to be sold and the proceeds equally divided among the six children, it could not possibly be claimed that the children were in any sense whatever partners.

If, instead of making such a will, the testator, in his lifetime, declared the same trust of the same property, for the same children, there would be no more reason for suggesting that the children were partners.

In neither case would the claim of partnership gain any strength or foundation whatever if the trust, instead of being for six children, were for the benefit of very numerous children and grandchildren.

The fact that the testator, or settlor, was not a relative at all would make no difference.

Neither would the fact that the trust (either by will or deed) was created for the benefit of a number of children, strangers to each other.

Either creation would be a strict trust, and the property would be taxable to the trustee, at the domicil of the beneficiaries, as property held in trust "the income of which is payable to another person." Of this there can be no possible doubt.

This condition and result remains unchanged though the trustee, by the directions of the trust instrument, uses part of the property so held by him to continue some "*business.*"

It remains the same, entirely regardless of any arrangements made, or attempted to be made, by either the testator or trustee, or the beneficiaries, or all of them together, for the issuance of any particular writing evidencing the interests of the beneficiaries, or affecting the transfer of those interests.

It remains the same though one of the beneficiaries

assigns his fractional interest to fifteen nephews and nieces, to whom, perhaps, new written evidences of interest issue.

Every trust beneficiary (in the absence of special provision) has an interest, right, or claim which is assignable. No provision making such assignment easy or difficult can affect the nature of the relation.

This precise question of the significance of scrip certificates or share ownership and the transferability of the same arose in two cases in Massachusetts: *Mayo* v. *Moritz*, 151 Mass. 481, and *Williams* v. *Milton*, 215 Mass. 1; and it was held that, notwithstanding the issue of any such certificates, the results were still strict trusts. (See the language of LORING, J., 215 Mass., at page 8.)

It is clear, therefore, that not all trust beneficiaries or *cestui que trusts* are *partners*.

It is important and helpful to observe the points which clearly follow from the foregoing.

Whether *cestui que trusts* are also partners does not depend—

(*a*) upon the manner of the trust creation;

(*b*) nor upon the pre-existing relations between the settlor, or testator, or trust declarant, and the beneficiaries;

(*c*) nor upon the number of beneficiaries.

(*d*) nor upon the nature of the trust assets, or the use made of them;

(*e*) nor upon the fact that the beneficial interests are evidenced by receipts, certificates, or so-called shares;

(*f*) nor upon any transferability given, or attempted to be given, to such receipts or shares.

None, nor all, of the foregoing would legally result in any legal qualification of an otherwise strict trust nor in any partnership among the beneficiaries.

Some additional element, not thus far appearing, would be necessary to create the quasi-partnership between *cestui que trusts*.

The further element required for the partnership relation is provided when *cestui que trusts* are found with some *control and authority, directly or indirectly*, in the management, and with liability for debts.

For a full discussion of partnership see opinion of GRAY, J., in *Meehan* v. *Valentine*, 145 U.S. 611, and cases cited.

A simple illustration may be suggestive and helpful:

X, Y, and Z (brothers) own Blackacre in common, through some inheritance or purchase. They are tenants in common, or co-owners, and nothing more.

Let them, however, go only a little way in severally contributing to a common fund, and jointly co-operating for mutual gain or loss, in some business venture upon Blackacre, and they *may* become partners.

And yet, if, instead of so doing, they join in a conveyance of Blackacre and other property to a trustee in trust to hold, manage, and develop, and pay the net income to X, Y, and Z, and their children, etc., the trustee being in sole and uncontrolled authority, no claim of partnership could be made; and this would remain true, even though the trustee conducted some business on the property. The Slater children are not partners

because their father's will authorized his trustees to carry on the mill business in Webster.

See *Bartlett* v. *Slater*, 211 Mass. 334.

The foregoing is all well-settled and rather familiar law in Massachusetts, and there are a number of cases in Massachusetts in which title has been held by trustees for the benefit of a number of beneficiaries, with such relations *inter sese*, and with such reserved power of management and control, that the Court has found them to be partnerships or quasi-partnerships.

Tyrrell v. *Washburn*, 6 Allen, 466.
Hoadley v. *County Commissioners*, 105 Mass. 519.
Whitman v. *Porter*, 107 Mass. 522.
Cook v. *Gray*, 133 Mass. 106.
Gleason v. *McKay*, 134 Mass. 419.
Phillips v. *Blatchford*, 137 Mass. 510.
Ricker v. *American Loan & Trust Co.*, 140 Mass. 346.
Cunniff v. *McDonnell*, 196 Mass. 7.
Quimby v. *Tapley*, 202 Mass. 601.
Williams v. *Boston*, 208 Mass., at page 500.

In every one of the cases above referred to it appeared that there was some form of control of the affairs of the various associations (direct or indirect) reserved to, and exercised by, the associates, so that there was not only an established relationship among the beneficiaries *inter sese*, but there was the power of control and management making one of the important features of the ordinary partnership.

The distinction here argued for is, however, clearly pointed out and definitely established by the Supreme Court of Massachusetts in two cases: *Williams* v. *Milton*, 215 Mass. 1, and *Foster* v. *Boston*, 215 Mass. 31; in both of which cases the contention was made that the trusts there in question were partnership associations, and in both of which the Court determined otherwise on the distinctions now urged.

In *Williams* v. *Milton* Mr. Justice Loring wrote an exhaustive opinion reviewing the cases and thoroughly discussing the principles involved. That was also a tax case and involved, as here, the question whether, under a certain declaration of trust, the so-called trustees were strict trustees, or whether they and their beneficiaries formed a quasi-partnership association.

No detailed review of the cases above cited is necessary here. *Williams* v. *Milton* states the law and the cases, and the law thus established has been followed more recently in *Ashley* v. *Dowling*, 203 Mass. 311, 317, and *Frost* v. *Thompson*, 219 Mass. 360, 365.

Distinguishing Features of the Case at Bar.

There are no facts whatever in the case at bar which bring it within the rules laid down in the ten collected cases above cited on page 13.

In the case at bar we have a strict trust. There is no association in fact of any kind; there is no basis for the claim of such association. The agreed facts make the creation of the trust perfectly clear. There are no shareholders' meetings; no beneficiary has any voice in the management, nor any control whatever over the

trustees. There is no delegated authority or management on any theory of agency. There is no reserved power of control. We have simply a case in which certain shares of stock and certain real estate under lease are held by strict trustees under a written instrument. The beneficiaries or *cestui que trusts* have no relations whatever *inter sese;* they are in no sense partners nor "associates" for any purpose whatever.

Whatever might have been, the plaintiffs in fact simply held an invested property, some corporate shares, and some leased real estate. They collected the dividends and the rentals and disbursed the whole net income. (Agreed Facts, Record, foot page 14.)

The English Authorities.

If we turn to the English authorities we find only confirmation of the principles and distinctions hereinabove set forth.

Statutes 25 and 26 Victoria, c. 89, sec. 4, provided, in substance, that no company, *association,* or partnership of more than twenty persons should be formed to carry on any business (other than banking) for gain, unless registered as a company under the Act; and a number of associations were brought to book and held to be governed by the Act.

Harris v. *Amery,* 35 L.J. C.P. 89.
Jennings v. *Hammond,* 9 Q.B.D. 225.
In re Padstow Association, 20 L.R. Ch. Div. 137.
Shaw v. *Benson,* 52 L.J. Q.B. 575.

There also arose two cases, one of a mutual insur-

ance association (*In re Arthur Average Association*, 44 L.J. Ch. 569), and another, the case of a trust investment company (*Sykes* v. *Beadon*, 48 L.J. Ch. 522); the associations in these two cases being held to be within the Act.

There then, however, arose the case of *Smith* v. *Anderson*, 50 L.J. Ch. 39, in the decision of which the Arthur Average Association case is criticized and doubted, and *Sykes* v. *Beadon* is disapproved and virtually overruled.

Smith v. *Anderson*, with the unanimous decision of JAMES, L.J., BRETT, L.J., and COTTON, L.J., fixed the law in England upon the questions herein involved; the case has never been overruled or modified, but is accepted as the leading case upon this question.

In *Smith* v. *Anderson* there was a trust of funds contributed by divers persons for the purchase of certain Submarine Company securities to be held and managed by the trustees; the "annual produce" to be applied to the expenses of the trust, the payment of interest on the certificates, and the redemption of the certificates or shares; the surplus income above 6 per cent being used for such redemption. Certificates of interest were to issue to subscribers, and the *cestui que trusts* might be very numerous. There was provision for an annual meeting of the certificate-holders for the purpose of (*a*) receiving report of the trustees, (*b*) appointing auditors, and (*c*) electing new trustees to fill vacancies, if any.

The Court of Appeal, overruling the master of the rolls, held that this was not an association under the Act of Victoria.

other relation whatever inter sese) and upon the trusts following viz:"

Mr. Justice Loring, in *Williams* v. *Milton*, *ut sup.*, at page 12, said:

> "Up to this time we have not alluded to the declaration in the indenture of trust herein questioned that it was the intention of the parties to it to create a trust and not a partnership. It is what the parties did in making the trust indenture that is decisive. If there had been doubt as to what they did, what they intended to do would have been a matter entitled to some consideration in determining what they did.'

See also *Taylor* v. *Davis*, 110 U.S. 330.

This matter of *intent* was also the deciding element in the Massachusetts cases arising from abortive attempts to create corporations.

In these cases the Courts have held that the result was an association, but not a partnership, because no partnership was intended by the would-be incorporators.

See *Ward* v. *Brigham*, 127 Mass. 24, at 27.

It was argued in the Court below, on behalf of the Collector, that the trusts in the case at bar were very similar to those discussed in *Roberts* v. *Anderson*, 226 Fed. 7, which was held taxable as a joint-stock company, and such argument may be repeated here.

If so, it seems only necessary to point out that that case involved the taxation in New York of the United States Express Company, which had been for many years doing business with some forty-five hundred offices, as organized under "Articles of Association" in which the associated parties had agreed that they "do

hereby severally and mutually covenant and agree to form a *joint-stock company* with the intent and purpose of doing and prosecuting a general express forwarding agency, commission, banking, exchange, and insurance business," etc. (see 226 Fed., foot of page 9), and it was averred by the United States Express Company that it was "an unincorporated association or partnership."

It is not surprising that the Court held that association taxable as a joint-stock association, under the laws of New York.

It is surprising that that case could ever have been suggested to the Court as having any similarity to the Wachusett Realty Trust under its strict trust declaration.

Reference at the argument in the Court below was made by counsel for the Collector to the case of *Liverpool Insurance Company* v. *Massachusetts*, 10 Wall. 566, at 568. This case involved the Liverpool & London Life & Fire Insurance Company, with an immense business in England and the United States. The question in the case was whether the company was an "association" or was "incorporated." (See page 567.) No such question as is fundamental in the case at bar was suggested or dealt with in *Liverpool Insurance Company* v. *Massachusetts*, and the case cannot be availed of in comparison.

The report shows that Messrs. B. R. Curtis and J. G. Abbott, counsel for the Insurance Company, not only admitted, but argued, that their client was an association.

The Collector's counsel, at the argument in the Court

below, after a detailed analysis of the statute provisions, made this argument:

> "The real test as disclosed by these provisions, seems to be the following: If the net income belongs to the beneficiaries so that their respective shares may be determined even though payment of them is temporarily withheld, it is regarded as a trust, and the trustee pays the tax on each cestui's share, provided that share is large enough to be taxable, and deducts the tax thus paid from the cestui's interest; the tax is thus upon the sum of the taxable interests of the beneficiaries therein; if the net income belongs to the trustees, and the beneficiaries become entitled to it only when and as dividends are declared, then it is an association within the meaning of the Statute, and the tax is upon the total net income, not upon the sum of the taxable interests of the beneficiaries therein."

Should such argument be repeated here, it is submitted—

(*a*) That the test suggested is not accurately expressed, but—

(*b*) If it be accurately expressed, the Wachusett Realty Trust is a case of trust, and not association, because under article 3 of the declaration (Record, page 11) the distributed income of the Wachusett Realty Trust does belong to the beneficiaries, and—

(*c*) It is entirely unwarranted, and perhaps misleading, to use the word "dividends" in connection with the Wachusett Realty Trust income or its distribution. Such income distribution by the trustees of the Wachusett Realty Trust is no more a "dividend" than is the similar distribution of income by any trustee under any will in Massachusetts.

(*d*) It is submitted as significant that Congress in

the second Income-Tax Act of September 8, 1916 (39 Stats. 756), in attempting to clear up certain questions which had arisen as to trust income under the Act of 1913, distinctly puts such income under part I, dealing with individuals, and not under part II, dealing with corporations.

It is respectfully submitted that the conclusion from the foregoing must fairly be that there can certainly be no well-founded claim of "association" in the case at bar, based upon any theory of quasi-partnership among the trustees or beneficiaries of the "Wachusett Realty Trust."

Indeed, the Circuit Court of Appeals, in deciding this case, was apparently fully satisfied that there was no quasi-partnership, and that the plaintiffs were strict trustees of a pure trust.

The opinion refers to the rescript of HALE, J., in *Crocker* v. *Crocker* (quoted *ante*, page 23), and to the decision of BINGHAM, J., in this case, and says:

> "We agree with the District Court in this case and in Crocker v. Crocker that the organization formed under this declaration of trust is not . . . to be regarded as an association in such sense as to make the beneficiaries partners and the plaintiffs their agents . . ."

Also:

> "But although their beneficiaries stood, neither as to the trust property, nor as to the profits of its control and management, nor as to the income therefrom as partners, *but only as beneficiaries of*

> *of a strict trust* [italics ours]; and although the plaintiffs were not the agents or representatives of a partnership but trustees in whose management and control of the trust property and business the beneficiaries had no direct voice . . ."
>
> Opinion, Record, page 48.

We have perhaps unnecessarily amplified the foregoing (because much of it is rather familiar law), but we have not wished to leave the point in any doubt whatever, and we submit that the foregoing is practically a demonstration that no claim can properly be made in this case of any "association" on the partnership theory. If this be true, the plaintiffs must prevail unless there be some other valid basis for the claim of association.

Thus we come to discuss the next point:

Can the plaintiffs, as trustees, or their cestui que trusts, or both, be held to form an association within the terms of the Act, sec. II, G (a)—"every corporation, joint-stock company or association, and every Insurance Company organized in the United States, no matter how created or organized, not including partnerships"— on any other theory than that of partnership?

(*a*) Is it not rather a startling proposition of law that trustees of a *strict trust* are "created" or "organized" as an "association" in any sense whatever; or that their strict *cestui que trusts* are any more so?

(*b*) Is it not significant that the trust instrument provides as to a fund (which has always been simply invested in corporate shares and leased real estate)

for its conversion into money and distribution to "*cestui que trusts* who shall be trust beneficiaries only without partnership, associate or any other relation whatever *inter sese*"?

Declaration of Trust, Record, page 9, par. 1.

That this intent of the parties may be material is shown by the cases *Williams* v. *Milton*, 215 Mass. 1, and *Taylor* v. *Davis*, 110 U.S. 330.

JOINT-STOCK ASSOCIATIONS.

"Joint-stock associations" have been known to the common law since the time of Queen Anne, and the term "joint-stock association" is, in the history of the development, more frequent than the term "joint-stock company." The former is the expression used by this Court in *Eliot* v. *Freeman*, 220 U.S., at page 186.

It is submitted that the words "joint-stock" in the Act of 1913 under discussion govern the word "association" just as much as the word "company," and that the intent of sub-section G (*a*) was to group only corporations and joint-stock companies similarly organized. It is submitted that this statute would have called for no different construction if the clause had read "joint-stock association or company" instead of "joint-stock company or association," and it is submitted that to hold the plaintiffs at the same time strict trustees of a pure trust and also a joint-stock association is unsound.

The law knows the corporation, the partnership, the trust, and, more recently, the joint-stock company, which is a large partnership organized for profit with

transferable shares and often some statute attributes. The law does not know any other classification. Massachusetts law knows no unincorporated "association" for business or profit except the partnership association, and hence the Wachusett Realty Trust, conceded not to be a partnership, cannot be held a joint-stock association unless there be imputed to Congress an intent to use established legal terms in a new and purely colloquial sense.

It may be frankly admitted that Congress, in the Act of 1913, intended to broaden the language which had been used in the Act of 1909 and construed in *Eliot* v. *Freeman*, and therefore changed the language from "organized under the laws of the United States or of any State" to the language "organized in the United States, no matter how created or organized;" but we still have the word "organized," which was discussed by the Court in *Eliot* v. *Freeman*, where the Court said of the trusts then under consideration that they could "hardly be said to be organized within the ordinary meaning of that term." (*Eliot* v. *Freeman*, 220 U.S. 186, at 187.) Where, in the case of the Wachusett Realty Trust, shall we find any *organization* whatever, particularly in view of the agreement not to be associates of any kind?

It was certainly not intended by the Act to put fiduciaries in the same class with corporations, because, by section D, special provision is made for returns by all fiduciaries.

This brings us to a discussion of—

THE THEORY ADOPTED BY THE CIRCUIT COURT OF APPEALS, AND THE REASONING OF ITS OPINION.

For the convenience of the Court we have put at the end hereof, in Appendix B (*post*, page 60), certain quoted excerpts, so far as material here, from the Act of October 3, 1913 (38 Stats. 166-172), in which we have emphasized by heavier type the particular words important in this connection; and also in Appendix C hereto (*post*, page 64), certain of the Treasury Regulations and Decisions promulgated in accordance with the terms of the Act itself.

The Court of Appeals decides that the Act taxes two classes of income only; viz.: (*a*) *individual* income, and (*b*) *group* income. (Record, foot page 57.) It then decides that the income of the *cestui que trusts* is not *individual* income, "arising or accruing to them" as individuals, because the trustees, *though, in fact, they distributed the entire net income* (Record, foot page 14), had the right to make reserves therefrom (Record, page 48), and that the income was not "immediately available to the beneficiaries." (Opinion, Record, at foot pages 46, 47.)

It then decides that, unless the income be considered *group income*, it is not taxable under any "*express provisions*" of the Act; and therefore, despite its conclusion that the trust in question is a "strict trust," and the beneficiaries strict "*cestui que trusts*" (Record, foot page 48), it decides, on a forced and unnatural construction of the words "joint-stock association," that either the trustees and their *cestui que*

trusts or the *cestui que trusts* separately, or the "trustees collectively" (it is very doubtful which), formed such an "association," and were taxable as such.

The intent of the Court of Appeals is obscure in respect of the persons held to constitute the "association."

First the Court says the "association" is of the *trustees* and the *cestui que trusts*. (Opinion, Record, top page 49.) Then it says the *cestui que trusts* alone were associated (Record, page 49), and finally that the income was received by the *trustees collectively*. (Record, foot page 49). Would the decision have been different if there had been one trustee instead of five? Would it be different for another year if one of the beneficiaries had then bought the fractional shares of all the rest?

It is to be observed that to hold the plaintiffs liable to taxation as a "joint-stock association" under section G there must be found some association of the plaintiffs not acting "in any fiduciary capacity," because, by the terms of section D (Appendix, *post*, page 61), even corporations and associations "acting in any fiduciary capacity" are to be taxed as such, and not under G.

We may assume, for the argument, with the Court of Appeals, that the Act taxes, generally, two classes only of income, viz., *individual* income and income of corporations, joint-stock companies, etc., generally referred to by the Court as "group" income. It is not true that income of a strict trust actually paid to a beneficiary is not his *individual* income because his trustees had some discretion as to distributing or hold-

ing or applying it. All the net income was, *in fact*, distributed by the trustees. (Record, foot page 14.)

It must certainly be true that income *in fact received* by a beneficiary from his trustee is his *individual income*, "arising or accruing" to him entirely, regardless of any question as to whether the payment by the trustee to him was discretionary or not; and this even though it is the duty of the trustee to withhold and pay the normal tax on such income.

There is no doubt that trustees, as to income *in fact distributed*, are subject to the express provisions of section D, regardless of any question as to whether the distribution was required or discretionary. Payments under a spendthrift trust are illustrative.

THE ERROR OF THE CIRCUIT COURT OF APPEALS.

The fundamental error of the Circuit Court of Appeals arose from its conclusion that the income in the case at bar cannot be taxed to the fiduciaries under any *express* provisions of the Act.

It may be granted that income received by trustees and held by them *undistributed* (and under such circumstances that perhaps no beneficiary could demand the same), would not be taxable to the trustee under any *express* provision of the Act, but it is not true that income *distributed* by trustees must not be returned by them, for taxation to them. This is made perfectly clear by reference to sub-sections D and E of the Act of 1913, the language of which is express and without reservation or exception, making it the duty of every trustee to make return to the Government of all income distributed to each beneficiary (if in excess of $3000 to any one), and making the trustee

liable to withhold and pay the Government the normal tax upon every share so disbursed by him if in excess of $3000—*except* that, if the income so paid over by trustees consists of dividends, to that extent the trustee is relieved from return and taxation because the beneficiary is entitled to receive such dividends free from the normal tax, and he is so entitled because the corporation is required to pay that normal tax on its earnings.

In other words, the reasoning of the Circuit Court of Appeals might possibly apply, in the case at bar, if the income in question had not been distributed by the trustees, or if there had been no distributees, but the income had been for accumulation under the trust. Such cases were dealt with by the Treasury Department by regulation, having resort to the fiction that, in such cases, the fund or trust estate should be regarded as the beneficiary, and the income taxed accordingly. Whether this regulation was valid or not is not in issue here.

In the case at bar the income was, in fact, all distributed, and therefore, by the *express* provisions of sub-sections D and E, the trustees were obliged to make return *as fiduciaries* and withhold and pay the Government the normal tax upon so much thereof as was not derived from dividends. They should be taxed accordingly.

The contention of the Collector in the case at bar is that the whole of the income, *including dividends,* is to be taxed to the trustees as the income of a joint-stock company or association, which means that the dividends forming part of the trust income would be taxed

despite the provisions of sub-sections D and E just above referred to.

It is perfectly clear that the taxation of the plaintiffs, as an association, is an exaction by the Government of much more than would be required if the taxation were to the plaintiffs as fiduciaries. It must be equally clear that the decision of the Circuit Court of Appeals is arrived at, in the last analysis, by giving a very strained construction to the words "joint-stock company or association."

Such strained construction of a Tax Act in favor of the Government is directly contrary to a recent and emphatic statement of this Court in *Gould* v. *Gould*, 245 U.S. 151, at 153, where the Court says:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen."

It is here that the Court of Appeals made its first error, and in consequence, in mistaken attempt to bring the assessment under some "express provision" of the Act, obliged itself to resort to its forced construction of the words "joint-stock association."

It is error to say in the same breath that certain individuals are "*cestui que trusts*" under a strict common-law trust (see Opinion, Record, foot page 48), but that at the same time they, either by themselves or together with the trustees, form a "joint-stock association" under the Act of 1913.

Such a decision throws all legal classification into doubt, and tends to great confusion of legal principles.

It is perfectly clear, whatever classes of income be taxable, that section D (*and not section G*) distinctly provides for returns by fiduciaries of the net income of the persons for whom they act, and that the trustees shall be subject to all the provisions of the section which apply to individuals. (See Appendix, *post*, page 61.)

The income of an individual *cestui que trust* is collected by his trustee, who has to make return thereof and pay the tax thereon.

The Act required such returns and payments from fiduciaries as to all income collected by them whether absolutely and immediately payable by them to some named beneficiary or not.

There is no resulting confusion whatever if *individual income* be held (as the Treasury Department rules) to include, not only all income actually paid over by a trustee to his *cestui que trust*, but all income "arising or accruing" to individuals, "whether distributed or not." (See Regulations, *post*, Appendix, page 64.)

The opinion of the Circuit Court of Appeals lays down in unqualified terms the proposition (clearly unsound, as we submit) that the income received by the trustees of the Wachusett Realty Trust could not possibly be deemed income accruing, through the hands of the trustees, to the beneficiaries individually, in spite of the fact that it was actually distributed among them; the only reason given being that, under the provisions of the declaration of trust, the trustees, while they did not do so in fact, yet had the *power*, in their discretion,

to withhold income from distribution and apply it to the development and improvement of the trust property. It could not, therefore, the Court holds, be income taxable to the trustees as fiduciaries, under section II, D, of the Income-Tax Act. (Opinion, Record, page 47.)

This conclusion, and the reason given therefor, the Court appears to regard as beyond question, and it is on this assumption that the Court seeks some other express provision of the statute, under which the income might be taxed. In this way the Court was led to adopt a strained and unnatural meaning of the word "*association.*" For the Court says, in substance: "It is impossible to consider this income as individual income of the beneficiaries, to be taxed to their trustees, through whom they received it, and, unless we can find a way to bring it under the clause taxing the income of corporations and similar 'group income,' it will escape taxation under any express provision of the statute."

This proposition is contrary to the practice of the Treasury Department.

As shown above, it is not sound as a construction of the statute, and, if the error is not corrected, it will cause great doubt and confusion in the administration of the law, under the later statutes as well as under the Act of 1913.

The Circuit Court of Appeals in the opinion (Record, foot of page 48) says that, if the Wachusett Trust were to be treated as an association *because* a partnership, such an organization could not "be regarded as belonging to either of the classes mentioned in Sec. II G (*a*) because the language there expressly excludes partnerships."

The learned Court evidently did not agree that the partnerships referred to in section G were intended to be only the ordinary commercial partnerships of limited members, and was therefore driven to find some other theory of "association." The theory adopted by the Court is set forth in the opinion (Record, page 49), where the Court says:

> "The trust declaration in effect associates them for the purposes of allowing extra compensation to the trustees, of filling vacancies in the office of trustee, or of modifying the terms of the declaration itself, when it requires for those purposes written assent from a 'majority in amount' or a 'majority in interest.'"

In other words, the Court says that, although the beneficiaries can originate or do nothing, yet that, because the trustees cannot do certain things without the assent of their *cestui que trusts* therefore those *cestui que trusts* are associated together for assent purposes in such a way as to become a joint-stock association, taxable as such, although the assent is without meeting or conference, is not given as associate action, but is purely the individual action of each beneficiary.

It is submitted that this is giving a meaning to the words "joint-stock association" which has never been given before and which was never intended by Congress.

Also, if the Circuit Court of Appeals is correct as to the partnerships excluded from section II, G (*a*), it would follow that organizations like the McKay Sewing Machine Association could not be taxed under that section. (See *Gleason* v. *McKay*, 134 Mass. 419.) This would be a surprising result.

It is submitted (notwithstanding the rescript of the Court of Appeals, Record, page 57) that the opinion, holding that trust income cannot be taxed as income of the *cestui que trust* unless it be "immediately available" as such to him—and if not so available to a *cestui que trust*, still cannot be taxed as the income of the trustee—does create grave doubt as to the taxation (and even taxability) of the income from some or all of the following:

(*a*) funds held in trust for accumulation.
(*b*) funds under all spendthrift trusts;
(*c*) funds held in strict trust for the maintenance of various objects, charitable or otherwise;
(*d*) all family trusts under wills, as settlements for the "support" of widows, or the "education and support" of children, and—
(*e*) all estates in process of settlement, including not only estates of deceased persons, but estates administered under assignments for the benefit of creditors, and in bankruptcy, and held by receivers—

because in none of these cases could it be held that the income had become "immediately available" to the beneficiaries, nor could it possibly be held that there was any "corporation, joint-stock company or association" taking the income.

What Does Sub-Section G (a) Cover?

It might pertinently be inquired what section G (*a*) was intended to cover. The language is: "every corporation, joint-stock company or association, and every insurance company, organized in the United States, no

matter how created or organized, not including partnerships."

It is submitted that this language would clearly include (saving the organizations exempted in paragraph (*c*)) every corporation duly organized by law, and every joint-stock company, such as the well-known partnership associations under the Pennsylvania law, and the joint-stock companies under the New York law, like the express companies; also joint-stock associations in Massachusetts, like the McKay Sewing Machine Association; but was never intended to cover groups or collections of individuals merely because they were all interested in some property or fund, held in strict trust for conversion into money and distribution among them, even though their trustees could not depart from the trust terms without their consent.

The words "not including partnerships" were probably used intending to refer to the ordinary commercial partnership of few members, to which the principle *delectus personarum* would apply, and not to all those business associations with numerous members and transferable shares which, in law, are held to result in partnerships where they have taken no other form legalized by statute.

The classification of the Act and Regulations is reasonably clear and is comprehensive. The opinion of the Circuit Court of Appeals leaves the law unfortunately vague and doubtful of application.

II.

This brings us to the second point, and the question raised in No. 1323:

DID THE DISTRICT COURT ERR IN DEDUCTING FROM ITS CLAIM FOR TAXES ASSESSED AGAINST THEM AS AN ASSOCIATION (FOR 1915) THE SUM OF $1321.33, AND ENTERING JUDGMENT FOR THE BALANCE ONLY, ON THE THEORY THAT THE PLAINTIFFS MIGHT HAVE BEEN ASSESSED AS FIDUCIARIES FOR $1321.33 UNDER ANOTHER SECTION OF THE ACT?

No. 1323 is a cross writ of error, brought by the plaintiffs below, claiming that the judgment which was entered in their favor should have included the full amount of the tax which they were compelled to pay as an association for the year 1915, without deduction of the amount of the tax which, as fiduciaries, they might have been required to pay for the same year upon the basis of the return which they made as such fiduciaries.

The tax which the plaintiffs would have been liable to pay if they had been assessed upon the return which they made as fiduciaries for the year 1915 would have amounted to $1321.33 or 1 per cent on the amount of net income shown in said return. (See copy of Return, Record, page 28.) (See Opinion of the District Judge, Record, page 35.)

But no tax was assessed on that return, the Government treating it as void, and requiring another return for the same year upon the form prescribed for returns of corporations, joint-stock companies or associations. The plaintiffs, under protest, filed the return called for (Record, page 18), and were assessed thereon as an association a tax of $6990.18, which they paid under protest.

The defendant (Collector) claimed that, if the plain-

tiffs were not lawfully assessed as an association, but were taxable as fiduciaries, they could not recover the whole amount which they were required to pay under such unlawful assessment for the year 1915, but only the difference between that sum and the sum which, according to their return as fiduciaries, they might have been lawfully required to pay as such fiduciaries.

The Court below sustained the Collector on this point, and gave judgment accordingly. The conclusion of the District Court is stated in the opinion as follows (Record, page 35):

> "The plaintiffs, as above stated, in 1915 were assessed as an association and paid a tax of $6,990.18. They should have been assessed as trustees and have paid a tax of $1,321.33. Having paid more that year than they should have, they are entitled to recover the difference or $5,668.85."

The Court erred, it is submitted, in treating the case—

(1) as if the United States were the real defendant, and—

(2) as if it were simply a case where the plaintiffs had "paid more that year [1915] than they should have."

A suit against a Collector of Internal Revenue to recover taxes claimed to have been illegally exacted is not a suit against the United States.

See *United States* v. *Emery*, 237 U.S. 28, 31.

It is settled that in suits of this kind the plaintiff, if

successful, recovers interest. Interest cannot be recovered in an action against the United States.

Kenney v. *Conant*, 166 Fed. 720.
Treat v. *Farmers Loan & Trust Co.*, 185 Fed. 760.
Schell v. *Cochran*, 107 U.S. 625.
National &c. Home v. *Parrish*, 229 U.S. 494.
Gulf Oil Co. v. *Lewellyn*, 242 Fed. 709; affirmed in this Court Dec. 9, 1918.
Klock &c. v. *Harrison*, 212 Fed. 758.

A suit against a Collector to recover taxes paid under protest cannot be brought against the Collector's successor in office; it must be brought against the person to whom, as Collector, the taxes were paid, although he ceased to be Collector before suit brought.

Philadelphia &c. Co. v. *Lederer*, 242 Fed. 492.

If such an action has been commenced and the defendant Collector dies pending the suit, the cause of action survives, and the Collector's personal representative, not his successor in office, is the proper party to be summoned in to defend.

Patton v. *Brady, Exrx.*, 184 U.S. 608.

In *Philadelphia &c. Co.* v. *Lederer*, 239 Fed. 184, and in the same case in the Court of Appeals (242 Fed. 492, above cited), reference is made to a statute passed in 1899, under the provisions of which, by proper steps, successors of officers of the United States may be substituted for them in suits commenced against the latter in their official capacity. (Act of Feb. 8, 1899, c. 121;

U.S. Comp. Stats. 1913, sec. 1594.) It was pointed out that this statute is in terms intended to prevent the abatement of suits, by or against an officer of the United States in his official capacity, by reason of his death, or the expiration of his term of office, or his resignation or removal from office. It would seem that this statute cannot apply to suits to enforce the personal liability of a Collector for taxes wrongfully collected by him in his official capacity, for such a suit, as decided by this Court in *Patton* v. *Brady, Exrx.* (above cited), is one which survives, on common-law principles, and does not abate on the death of the defendant. *Patton* v. *Brady* was decided in 1902, and the action was commenced after the passage of the statute above referred to.

The nature of the action and the statutory provisions applicable are well summarized in the opinion of Judge THOMPSON in *Philadelphia &c. Co.* v. *Lederer,* 239 Fed. 184, at page 186:

> "(2) The cause of action in these cases is assumpsit upon an implied contract to return money unlawfully received. The nature of the action is clearly determined in the case of Patton v. Brady, Ex'x., 184 U.S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713, where Mr. Justice Brewer reviews the prior cases, and it is held that, where a collector dies pending the suit, the suit survives against his personal representative. That upon a judgment in such an action the collector is personally liable and execution can, except for statutory provisions, be had against his property, there appears to be no doubt.
>
> "In suits brought against collectors of the revenue for acts done by them or for the recovery of money exacted by or paid to them and by them

paid into the treasury, Congress by the Act of Sept. 24, 1789, c. 20, 1 St. 92, reenacted by the Act of March 3, 1863, c. 76, Sec. 13, 12 St. 741, made it the duty of district attorneys to appear in behalf of the defendants in such suits unless otherwise instructed by the Secretary of the Treasury. Rev. Stat. 771 (Comp. St. 1913, Sec. 1296). And, in order to protect collectors from personal liability for official acts in proper cases, by section 12 of the Act of March 3, 1863, Rev. St. Sec. 989 (Comp. St. 1913, Sec. 1635), Congress provided:

"'When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the secretary of the Treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury.'"

The fact that upon a judgment in such an action the Collector is personally liable, upon common-law principles, and that, although his personal liability may in practice be rarely enforced, yet that it can and will be enforced unless the Court in its discretion makes a certificate of probable cause, as provided in the statutes, disposes of the contention that the action is "substantially" against the United States.

It is true that, if and when a certificate of probable cause has been obtained, it may be said that the action then, in a sense, becomes an action against the United States, and having in mind the statute provisions re-

ferred to, protecting the Collector from personal liability, some judges have described the action as "substantially" against the United States. But the judgment, in all cases, is entered as a personal judgment against the Collector, or his personal representatives in case of his death, and becomes payable by the United States only when a certificate of probable cause has been duly granted.

No certificate of probable cause has issued in this case.

There is no doubt that, but for the provisions of section 989 of the Revised Statutes (Act of March 3, 1863, sec. 12), the Collector would, in all cases, be liable personally on a judgment rendered against him in a suit brought to recover taxes illegally exacted.

It is only under the provisions of section 989 that such a suit can ever be the foundation of a claim against the United States. But section 989 only comes into operation, according to its terms, "when a recovery is had against the Collector, and the court certifies that there was probable cause," etc.

Not until the suit has reached the stage when it is ripe for final judgment, after the defendant's liability and the amount of the plaintiff's recovery have been determined by the verdict or finding, can it be said that a recovery has been had. And not until then may application be made to the Court under section 989 for a certificate of probable cause. Unless and until the certificate is granted, the defendant will not be relieved from liability to have the judgment enforced against him, nor will the plaintiff have any right to look to the United States for the satisfaction of the judgment.

It can never appear in such a suit, until recovery had by verdict or finding, fixing the amount to be recovered, whether or not the judgment will, by proceedings under section 989, be made a claim upon the treasury of the United States. How, then, can it be permissible for alleged claims in favor of the United States against the plaintiff to be set up by the defendant or considered by the Court or jury, by way of set-off or in reduction of damages? The Collector is the sole defendant. The United States is neither party to the record, nor privy, nor "substantially" the defendant. After recovery had, if the Court sees fit to certify as provided in section 989, the judgment becomes payable out of the treasury of the United States, and not otherwise.

The purpose and effect of section 989 are not to make the United States in any sense a party to the suit, but to protect the Collector, as an officer of the Government, from personal liability, when it appears to the Court that he was acting in good faith. The statute affords protection to the Collector, not by providing that the United States may be called upon to defend the suit, and be substituted for the Collector as defendant, as in cases of warranty, but by providing in effect that, in proper cases, execution shall be stayed on a judgment against the Collector, and that, instead of levying on the goods and estate of the Collector, the plaintiff shall have his judgment paid out of the treasury of the United States.

This is not a case like *Anderson* v. *Farmers Loan & Trust Co.*, 241 Fed. 322. In that case the Trust Company sought to recover of the Collector the amount

which it had been obliged to pay as a tax on capital employed in banking. It was held that the plaintiff was not entitled to recover the whole tax upon showing merely that the assessment was erroneous in that it had been computed on the theory that the company's entire capital was used or employed in banking, but that the plaintiff must go further, and show just what portion of the tax had been assessed on capital not so used or employed.

It was found by the Court that a portion of the plaintiff's capital was employed in banking, and, such being the fact, that the assessment of the tax by the Commissioner of Internal Revenue, though incorrect in amount, was not wholly void, and that the act of the Collector in collecting the tax was not altogether illegal. A portion of the tax assessed was legally due, and the Court held that the burden was on the plaintiff to show what portion was not legally due, and that it could recover only so much of the tax as it could show to be in excess of the amount legally due.

We believe that we have shown above that, in the case at bar, the assessment for the year 1915 was wholly void. The District Court so found and ruled. The Wachusett Realty Trust was not a corporation, joint-stock company, or association. The plaintiffs were not taxable at all as such association, nor as the officers or agents of such association; the assessment made by the Commissioner of Internal Revenue was therefore wholly illegal, and conferred no authority upon the Collector to exact any payment whatever from the plaintiffs.

In the Farmers Loan & Trust Company case it appeared that a part of the tax assessed and collected

was legally due from the Trust Company as a banking association. In the case at bar no part of the tax assessed upon the plaintiffs as an association was due and payable, for there was no such association.

The Farmers Loan & Trust Company case was decided upon the elementary rule that the burden is upon the plaintiff to prove his case, not at all upon the theory that the United States was the party defendant in any sense. The plaintiff in that case alleged that the Collector had unlawfully exacted from it payment of a tax without warrant of law and sought to recover it back. The Court decided that as to part of the tax, the Collector had not acted without warrant of law in collecting it, because the assessment made by the Commissioner of Internal Revenue, although erroneous and excessive, was not void. It was not void, because the Commissioner had jurisdiction under the statute to assess a tax upon the plaintiff as a banking corporation, it being found as a fact (although the plaintiff claimed otherwise) that a part of its capital was employed in banking. It appeared, therefore, that the plaintiff was entitled to recover from the Collector only so much of the tax as it could show to have been in excess of the amount which it ought to have been assessed *in manner and form as it was assessed.*

The theory of the Farmers Loan & Trust Company case was not that the defendant Collector had a good defense to set up by way of *set-off* or *counterclaim,* but that the plaintiff was unable to maintain its case as to the entire amount claimed.

In the case at bar, on the contrary, the plaintiffs have sustained their case as to the whole amount

claimed. The assessment of the tax of $6990.18 upon the trustees of Wachusett Realty Trust as an association was wholly void, and without warrant of law. The assessment therefore conferred no authority upon the defendant to exact payment of $6990.18, or of any less sum.

The defendant Collector had no authority to collect any tax whatever from the plaintiffs for the year 1915. If they were liable as fiduciaries, under other provisions of the Income-Tax Law, no tax was ever demanded of them as such. The Collector has by law no authority to demand or collect any tax not first duly assessed by the Commissioner of Internal Revenue. No such authority is claimed on behalf of the Collector in this case. Yet it is claimed that the recovery against him should be reduced by the amount of the tax which might have been assessed against the plaintiffs *as fiduciaries*. This claim, it is submitted, is one which could only be set up by the United States in a proceeding in which the United States was a party.

If the judgment as entered below were to be affirmed as it stands, it is submitted that the plaintiffs would not be protected from a claim by the Government for taxes later assessed to them for the year 1915 *as fiduciaries*.

The United States is not a party to this record, and would not be concluded by the fact that, in giving judgment, the Court deducted the sum of $1321.33 as the amount of taxes which the plaintiffs appeared to be liable to pay to the United States for the year 1915 as fiduciaries.

If the decision of the Court below that the plaintiffs were not taxable as an association, but as fiduciaries, is affirmed by this Court, it is to be expected that the Government officials will forthwith seek to collect from the plaintiffs a tax for the year 1915. The Collector would have no authority to acknowledge that the tax had been collected by way of set-off, nor has the attorney of the United States who appears for the defendant in this case any authority to conclude the United States by stipulation or otherwise.

The District Attorney appears for the Collector in this case; not for the United States. He appears for the defendant under Rev. Stats. sec. 771, which provides that it shall be the duty of District Attorneys, "unless otherwise instructed by the Secretary of the Treasury, to appear *in behalf of the defendants* in all suits or proceedings pending in his district against Collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers and by them paid into the treasury."

It is submitted that the judgment below should be corrected so as to include the whole of the tax which was illegally collected of the plaintiffs for the year 1915, without deduction of the sum of $1321.33.

The law provides ample means to the Government for the collection of the tax due in respect of the year 1915 from the plaintiffs as fiduciaries.

Even if the time limited by statute for making an assessment by the Commissioner of Internal Revenue should have expired, the United States would not be without remedy, for a suit could be brought in the name

of the United States for the recovery of the tax due, although no assessment had been made, according to the rule laid down in *Dollar Savings Bank* v. *United States*, 19 Wall. 227; affirmed in *United States* v. *Chamberlin*, 219 U.S. 250-260.

It may be likely that the matter of the 1915 tax payable by the plaintiffs *as fiduciaries* would be taken up between the plaintiffs and the proper officers of the Government and would be settled without the necessity for resort to legal proceedings, but in such a way that the plaintiffs would obtain a proper voucher from the Collector, or from the Treasury Department.

But the plaintiffs should not be left in such position that, if, later, they be assessed *as fiduciaries*, they would have no better answer than that, in this suit of theirs against the Collector, the Court had taken such fiduciary liability into account.

No judgment in this suit can be *res adjudicata* against the Government. Nothing less than *res adjudicata* leaves the plaintiffs properly protected.

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APPENDIX A.

The Wachusett Realty Trust Declaration.

Know All Men by These Presents That we, Alvah Crocker and Charles T. Crocker both of Fitchburg in the Commonwealth of Massachusetts, John J. Riker of the City and State of New York, Samuel E. M. Crocker of said Fitchburg, and Felix Rackemann of Milton in said Commonwealth, the grantees named in a certain deed from the Crocker, Burbank & Co., Inc., (Maine Corporation), dated this day by which deed there are conveyed to us certain lands and buildings situate in the City of Fitchburg in the Commonwealth of Massachusetts, hereby declare and agree that we will, and our heirs and successors shall, hold said granted premises, and all other funds and property at any time transferred to and received by the Trustees hereunder, for the purposes, with the powers, and subject to the provisions hereof, for the benefit of the *cestui que trusts* (who shall be trust beneficiaries only, without partnership, associate or any other relation whatever *inter sese*), and upon the trusts following, viz:

1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion and distribution, except that the same shall not be postponed beyond the end of twenty years from and after the death of the last survivor of the persons named and described in the last paragraph hereof. During such

postponement, and until such conversion, the interests of the *cestui que trusts* shall be considered for purposes of transmission and otherwise as personal property.

2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having, for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have if they were themselves the sole and absolute beneficial owners thereof in fee simple.

3. In trust to collect and receive all rents and income from the property, and semi-annually or oftener at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income, to and among the several *cestui que trusts* according to their respective fractional interests, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development of the property held hereunder, or the acquisition of other property as the Trustees may determine to be wise and expedient, for the protection and development of the trust property as a whole pending its conversion and distribution. The determinations of the Trustees, made in good faith, as to all questions as between "capital" and "income" shall be final.

4. The said Crocker, Burbank & Co. Inc., (Maine Company) having determined to wind up its affairs and be dissolved, without waiting for final cash sale

of its real estate, this trust is declared in favor, and for the benefit of the eight shareholders of said Maine corporation, according to their respective fractional interests, to whom the Trustees shall issue proper receipt certificates, which certificates, and all others which may be hereafter issued in exchange or substitution therefor, shall be deemed parts hereof and conclusively evidence the ownership of respective interests in this trust; and the Trustees shall, from time to time, on request, (on surrender of the old) issue such new certificates as may be proper and necessary to evidence any new or sub-divided interests.

5. The Trustees shall have authority to borrow money and fix the terms of any loans, and give any pledge, mortgage or other security which they may deem wise.

No purchaser from or lender to the Trustees shall ever have any liability to see to the application of any proceeds.

6. The Trustees may employ all such agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors or omissions of such agents or attorneys employed and retained with reasonable care.

7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustees serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability except for the results of his own gross negligence or bad faith.

8. The recording of this instrument shall be at such

times and in such places as the Trustees may in their discretion, determine to be necessary or expedient, and they shall in like manner determine the form and record of all muniments of title.

9. The Trustees shall have full power at any time, pending final termination of this trust, to transfer the whole or any part of the property then held by them hereunder to any corporation which they may acquire or cause to be organized for the more convenient or expedient holding or management of the property, taking any securities issued by such corporation in exchange and payment therefor, and the Trustees, or any of them, may at any time be or become directors or officers of any corporation any shares of which are held by them.

10. The Trustees shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent reckoned upon the gross income received by them as such, unless, at any time, a majority in interest of the *cestui que trusts* consent in writing to some larger compensation for any past service. The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses to and from any meetings of the Trustees shall be considered proper expenses.

11. Any Trustee hereunder may resign by written instrument duly acknowledged and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

Any vacancy in the office of the Trustee, however

occasioned, shall be filled by the remaining Trustees by an instrument in writing, signed by them and assented to in writing, by the holder or holders of a majority in amount of the beneficial interests herein, such appointment to be in like manner attached to the original of this instrument, or recorded as in the case of resignation last above provided for.

12. If, at any time or times, a majority of the Trustees hereunder shall certify in writing that the remaining Trustees are either absent from the Commonwealth of Massachusetts or incapacitated through illness or otherwise, from acting, then such majority shall, at such time or times, have, and may exercise, any and all the powers of the Trustees hereunder with like effect as if similarly exercised by all.

13. The terms and provisions of this trust may be modified at any time or times by instrument in writing, signed, sealed and acknowledged by the then Trustees, assented to in writing by a majority in interest of the *cestui que trusts*, and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

14. The certificate in writing of the Trustees as to any resignation from the office of Trustee hereunder and as to the appointment of any new trustees hereunder and as to the existence or non-existence of any modifications hereof, may always be relied upon, and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees in reliance upon such certificate.

15. The title of this trust, (fixed for convenience) shall be "The Wachusett Realty Trust," and the term

"Trustees" in this instrument shall be deemed to include the original and all successor trustees.

16. At the end of twenty years from and after the death of the last survivor of said Charles T. Crocker, Samuel E. M. Crocker and Alvah Crocker, and of the lawful issue now living of any of them (unless this trust shall heretofore have been otherwise lawfully terminated), all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled.

In Witness Whereof we have hereunto set our hands and common seal on this 29th day of March in the year nineteen hundred and twelve.

ALVAH CROCKER (Seal)
CHARLES T. CROCKER
JOHN J. RIKER
FELIX RACKEMANN
SAMUEL E. M. CROCKER

Commonwealth of Massachusetts

Worcester, ss. March 29, 1912.

Then personally appeared the above named Alvah Crocker and acknowledged the foregoing instrument to be his free act and deed,

Before me,

.....

Justice of the Peace.

APPENDIX B.

The Provisions of the Act.

Section II.

"A. Subdivision 1: That there shall be **levied, assessed,** collected, and paid annually upon the entire **net income arising** or accruing from all sources in the preceding calendar year **to every citizen** of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; . . .

"Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be **levied, assessed** and collected, upon the net income of every individual an additional income tax (herein referred to as **the additional tax**)" . . . All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of Paragraph A, shall apply to the levy, assessment and collection of the additional tax imposed under this section. **Every person** subject to this additional tax shall, for the purpose of its assessment and collection, make a **personal return of his total net income from all sources,** corporate or otherwise, for the preceding calendar year, **under rules and regulations to be prescribed by the Commissioner of Internal Revenue** and approved by the Secretary of the Treasury. For the purpose of this additional tax the **taxable income of any individual** shall embrace the share **to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not,** of all **corporations, joint-stock companies, or associations** however created or organized, . . ."

(The second paragraph of B provides for certain

deductions allowable in the case of individual returns, including, "seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, joint stock company, association, or insurance company which is taxable upon its net income as hereinafter provided.")

"D. . . . On or before the first day of March, nineteen hundred and fourteen, and the first day of March in each year thereafter, a true and accurate **return, under oath** or affirmation, shall be made **by each person of** lawful age, except as hereinafter provided, subject to the tax imposed by this section, and having a net income of $3,000 or over **for the taxable year,** to the collector of internal revenue for the district in which such person resides or has his principal place of business, . . . **in such** form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, [etc.] . . . ; **guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals Provided,** That a return made by one of two or more joint guardians, trustees, executors, [etc.] . . . **under such regulations as the Secretary of the Treasury may prescribe,** shall be a sufficient compliance with the requirements of this paragraph; and also all persons, firms, companies, copartnerships, corporations, **joint-stock companies or associations,** and insurance companies, except as hereinafter provided, in whatever capacity acting, having **the control, receipt, disposal,** or payment of fixed or determinable annual or periodical gains, profits, and **income of another person sub-**

ject to tax, shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a return, as aforesaid, but separate and distinct, of the portion of the income of each person from which the normal tax has been thus withheld, and containing, [etc.] . . .

"E. . . . All **persons, firms,** copartnerships, companies, corporations, **joint-stock companies or associations,** and insurance companies, in **whatever capacity acting,** including lessees or mortgagors of real or personal property, **trustees acting in any trust capacity,** executors, administrators, agents, receivers, conservators, employers, and all officers and employees of the United States **having the control, receipt, custody,** disposal, or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable annual gains, profits, and **income of another person,** exceeding $3,000. for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her, or its district, **are hereby authorized and required** to **deduct and withhold** from such annual gains, profits, and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax."

"G. (*a*) That the **normal tax hereinbefore imposed upon individuals** likewise **shall be levied, assessed, and paid** annually upon the entire net income arising or accruing from all sources during the preceding calendar year to **every corporation, joint-stock company or association, and every insur-**

ance company, organized in the United States, no matter how created or organized, not including partnerships. . . ."

"(*c*) The tax herein imposed shall be computed upon its entire net income accrued within each preceding calendar year ending December thirty-first: . . ."

APPENDIX C.

The Treasury Rules and Regulations.

Article 74 of Regulations No. 33, dated January 5, 1914, provided for the tax to **fiduciaries** "having control of any portion of an annual income accruing during the year," for beneficiaries having a distributive interest, but the income not being distributed or paid over.

T.D. 2231 (superseding original Art. 70 of Regulations No. 33) provided, generally, that guardians, trustees, executors, etc., and all persons acting in any fiduciary capacity, who hold in trust an estate of any other person or persons, shall be designated the "source," "for the purpose of collecting the income tax." It then provided as follows:

> "Fiduciaries shall, on or before March 1 of each year, make and render a return, in form prescribed by the Commissioner of Internal Revenue, of the income coming into their custody or control and management from each trust estate when the annual interest of any beneficiary in the income of said trust estate subject to the normal tax is in excess of $3,000, and also when the undistributed income of the estate (as an entity or beneficiary in and of itself for tax purposes), consisting of income from dividends of corporations and other income (or of dividends alone), shall exceed $20,000. In such cases the estate shall be reported as a beneficiary for the undistributed income."

And also:

> "The income of trust estates, as any other income, is subject to the income tax. When such income is received annually by a beneficiary of an estate the fiduciary will withhold the normal tax due and subject to withholding by him. Any part

of the annual income of trust estates not distributed becomes an entity and, as such, is liable for the normal and additional tax, which must be paid by the fiduciary."

T.D. 2231 was amended by T.D. 2289 to read as follows:

"T. D. 2231 is hereby amended to provide that fiduciaries having control of any portion of income accruing during the year to known beneficiaries other than trust estates, as provided in T. D. 2231, but not distributed or paid to the beneficiaries during the year, shall, in rendering their annual return (Form 1041) give the name and address of each of said beneficiaries having a distributive interest in said income, and shall furnish all the information called for in such returns. In all such cases the fiduciary shall withhold and pay to the Collector, as provided by law, the normal tax of one per cent. upon the distributive interest of each of said beneficiaries, when such interest is in excess of $3,000, the same as if said income were actually distributed and paid to the beneficiaries," etc.

Note, in the foregoing, that the fiduciary is to "withhold and pay." It was in accordance with such Treasury Decisions and Regulations that all such cases have been uniformly taxed for several years.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

ALVAH CROCKER ET AL., ETC., PETITIONERS,
v.
JOHN F. MALLEY, COLLECTOR.
} No. 649.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION ON BEHALF OF RESPONDENT TO ADVANCE.

Comes now the Solicitor General, on behalf of the respondent, and respectfully moves that the above-entitled cause be advanced for hearing during the present term.

The case involves the liability of petitioners to an income tax for the years 1913, 1914, and 1915, amounting to about $10,000, under certain provisions of the Income Tax Act of October 3, 1913, 38 Stat. 114, 166, 168, 169, 172.

Parts of paragraphs A, D, and G (a) of Section II of that act are the pertinent statutory provisions and are as follows:

> A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every

citizen of the United States * * * a tax of 1 per centum per annum upon such income, except as hereinafter provided.

D. * * * guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals: * * * *Provided further*, That persons liable for the normal income tax only, on their own acount or in behalf of another, shall not be required to make return of the income derived from dividends on capital stock or from the net earnings of corporations, joint-stock companies or associations, and insurance companies taxable upon their net income as hereinafter provided.

G. (a) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association * * * organized in the United States, no matter how created or organized, not including partnerships.

Petitioners constitute a common-law trust known as the "Wachusett Realty Trust," created in Massachusetts prior to the passage of the Income Tax Act. The property of the trust consists of real estate and

shares of stock in a Massachusetts corporation, the legal title to which is vested in the trustees, who have full management and control. The income is derived from the dividends on the stock and the rentals of the real estate. The trustees are authorized to collect the income and to pay to the beneficiaries such portion thereof receivable as they may "in their discretion determine to be fairly distributable net income." The interest of the beneficiaries is represented by receipt certificates issued by the trustees, which are to be taken to be personal property and which are transferable, new certificates being issued to evidence new or subdivided interests.

The question is as to which of the statutory enactments above quoted are applicable to petitioners. The District Court held that paragraph D, relating to fiduciaries, controlled, and that petitioners were taxable thereunder. The Circuit Court of Appeals for the First Circuit reversed the District Court, holding paragraph G (a) applicable, and declared petitioners liable for the entire amount involved.

The Treasury Department advises that the question here presented is involved in a number of other cases, and is important in fixing the tax liability of many other concerns. An early decision is therefore of importance to that department in its administration of the Income Tax Act.

ALEX. C. KING,
Solicitor General.

JANUARY, 1919.

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